142 — 254

142 — 254

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 701. ~~353~~ 65

THE KAUKAUNA WATER-POWER COMPANY, BRADNER SMITH & COMPANY, JAMES C. DELANEY, CHARLES D. CASSED, DAVID McCARTNEY, JAMES H. ELMORE, JOSEPH KLEIN, THE MILWAUKEE, LAKE SHORE AND WESTERN RAILWAY COMPANY, THE BADGER PAPER COMPANY, AND B. AYMAR SANDS, TRUSTEE, PLAINTIFFS IN ERROR,

vs.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF OUTAGAMIE COUNTY, STATE OF WISCONSIN.

FILED AUGUST 2, 1888.

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INDEX.

	Original.	Print.
Summons	1	1
Complaint	3	1
Exhibit A—Extract from deed	11	14
Answer	13	15
Order amending summons and complaint	23	28
Affidavits of Moses Hooper	25	28
Order for publication of summons	29	30
Plaintiffs' proposed findings of fact (rejected)	31	31
Defendant's proposed findings of fact (rejected)	43	37
Exceptions of plaintiff to findings of fact, &c.	55	42
Findings of fact	61	45
Judgment	69	49
Bill of exceptions	71	50
Exhibits offered	71	50
Testimony of A. L. Smith	73	51
Exhibits offered	84	57

JUDD & DETWEILER, PRINTERS, WASHINGTON, JUNE 11, 1889.

	Original.	Print.
Testimony of B. J. Stevens	89	59
N. M. Edwards	94	62
John P. Dietrich	101	67
Peter Lewis	106	68
Exhibits offered	107	69
Testimony of Col. C. A. Fuller	114	73
Morgan L. Martin	116	74
Exhibits offered	125	78
Testimony of Morgan L. Martin (recalled)	127	79
Notice of appeal, &c.	130	80
Certificate of clerk of circuit court	132	81
Order of chief justice of supreme court of Wisconsin returning record for correction	134	82
Map of Ledyard	136	82
Remittitur	137	82
Opinion of supreme court of Wisconsin	139	83
Opinion of supreme court of Wisconsin on petitions for rehearing	163	94
Stipulation as to answer	167	95
Affidavit of Moses Hooper	169	95
Judgment on remittitur	171	96
Clerk's certificate	175	98
Petition for writ of error	176	98
Bond	180	100
Assignment of errors	183	101
Citation	189	104
Proof of service of citation	190	104
Writ of error	191	105
Clerk's return and certificate	194	106

1 In Circuit Court, Outagamie County.

THE GREEN BAY & MISSISSIPPI CANAL COMPANY, Plaintiff,

vs.

THE KAUKAUNA WATER POWER COMPANY, BRADNER SMITH & COMPANY, JAMES C. DELANEY, CHARLES D. CASED, DAVID MCCARTNEY, JAMES H. ELMORE, JOSEPH KLEIN, THE MILWAUKEE, LAKE SHORE AND WESTERN RAILWAY COMPANY, AND BADGER PAPER COMPANY, & B. AYMER SANDS, as Trustee (see order filed March 11, 1886), Defendants.

The State of Wisconsin to said defendants and each of them:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

P. O. address, Oshkosh, Winnebago county, Wis.

MOSES HOOPER,
Plaintiff's Attorney.

2 [Endorsed:] Circuit court, Outagamie county. The Green Bay and Mississippi Canal Company *vs.* The Kaukauna Water Power Company *et al.* Summons. Filed Jan. 12, 1886. F. C. Friedrichs, clerk. Filed July 22, 1887. Clarence Kellogg, clerk sup. c't Wis. Moses Hooper, plaintiff's attorney.

3 In Circuit Court, Outagamie County.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY, Plaintiff,

vs.

THE KAUKAUNA WATER POWER COMPANY, BRADNER SMITH & COMPANY, JAMES C. DELANEY, CHARLES D. CASED, DAVID MCCARTNEY, JAMES H. ELMORE, JOSEPH KLEIN, THE MILWAUKEE, LAKE SHORE & WESTERN RAILWAY COMPANY, AND BADGER PAPER COMPANY, AND B. AYMER SANDS, as Trustee (see order filed March 11, 1886), Defendants.

The plaintiff complains of the defendants, for this—

That The Green Bay and Mississippi Canal Company, plaintiff, and The Kaukauna Water Power Company, The Badger Paper Company, and The Milwaukee, Lake Shore & Western Railway Company, defendants, are corporations created by and under and existing under the laws of the State of Wisconsin, and that the Bradner Smith & Company is a foreign corporation.

That the Fox river and Wisconsin river, in the State of Wisconsin, were in the year 1787 and ever since have been navigable waters, the Wisconsin river leading into the Mississippi river and the Fox river leading into the St. Lawrence river.

That the same then were and ever since have been great public highways.

That the Fox river has an average flow at low water of over 150,000 cubic feet per minute, and affords a water power of over 300 horse-power per foot fall.

That at the time of the survey of the lands adjacent to the same by the United States the same were meandered and the borders of the same defined by meander lines of the United States survey.

That there existed in the Fox river, below Lake Winnebago, rapids and falls, and that the improvement of the navigation of the same so as to secure slack-water navigation through the same required the building of dams and locks and canals at great expense.

That the United States, in order to aid in the improvement of said Fox and Wisconsin rivers, and to connect the same by a canal, and thereby secure great advantage to the commerce of the States of the United States, did, by an act approved August 8th, 1846, grant to the State of Wisconsin, on its admission into the Union, a large amount of public lands of the United States, to wit, many thousands of acres of public lands, for the expressed purpose of and in trust for improving the navigation of such Fox and Wisconsin rivers.

That on the 29th day of June, 1848, the State of Wisconsin, having been admitted into the Union, accepted said grant of land for the uses and purposes expressed in said grant.

That the State of Wisconsin, by an act approved August 8th, 1848, undertook the improvement of the Fox and Wisconsin rivers and the sale of said lands and the application of the proceeds thereof to the use for which the same had been granted, and in said act provided for a board of public works to superintend the completion of such improvement.

In said act the said State of Wisconsin provided that "whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers such water power shall belong to the State, subject to the future action of the Legislature." By this act the State of Wisconsin appropriated to its own use and the use of its assigns and successors the water power of the said Fox river, which should thereafter be made available by dams erected in the business of improving said Fox river: that such appropriation was necessary to secure the improvement of said rivers and to prevent the application of the proceeds of the public lands granted as aforesaid from being expended upon dams which should furnish hydraulic power to private parties, owners of the lands bordering on the banks of said Fox river, and thus be substantially diverted from the use for which they had been granted: that such water powers were and are of great value, and that the value thereof has been expended in improving the navigation of said rivers within the intention of said act of Congress.

That one of the rapids on the Fox river, below Lake Win-
4 nebago, around which it was necessary to build a canal and at which it was necessary to build a dam to secure slack-water navigation and to secure the improvement of said Fox river

within the intention of said act of Congress, was in town. 21 north, of range 18 east, of the fourth principal meridian.

That in the prosecution of the work of said improvement, in order to secure slack-water navigation around said rapids, the State of Wisconsin did, between the 8th day of August, 1848, and the 6th of July, 1853, build a dam at the head of said rapids, so as to raise the water upwards of eight feet above natural level, reaching from lot five (5), section 22, south of the river, to section 24, north of the river, in said town. and range, and did build a canal and locks on the north side of the river, reaching from the pond created by said dam to the slack water of said river below the rapids and below said dam.

That the building and maintenance of said dam and canal and locks were necessary to the completion of the works contemplated by the act of the United States making such grant of land as above mentioned, and was a part of the purpose for which said lands were granted.

That said dam was built and maintained under the authority of said act of the State of Wisconsin, approved August 8th, 1848, and amendatory acts, providing for the completion of such improvement, and that there is no other authority for building or maintenance of the same.

That on the 6th day of July, 1853, the State of Wisconsin having found itself unable to fully complete said works of improvement from the grant made to them by the United States and the hydraulic powers created by dams built under said act, and having become largely indebted for moneys spent upon such improvement, including the dam and locks above mentioned, and being involved by numerous unfulfilled contracts, payments on which it could not make from funds derived from said land grants or any other funds or property applicable thereto, the said State incorporated the Fox and Wisconsin Improvement Company for the purpose of completing such improvement of said Fox and Wisconsin rivers and relieving the State of its indebtedness on account of the work theretofore done on the same and from liability on contracts not then executed. For such purpose the State of Wisconsin granted to the Fox and Wisconsin Improvement Co. the works of improvement heretofore mentioned, together with all and singular the rights of way, dams, locks, canals, water power, and other appurtenances of said works; also all the rights possessed by the State of demanding and receiving tolls and rents for the same, so far as the State possessed or was authorized to grant the same; and all privileges of constructing said work and repairing the same; and all other rights and privileges belonging to such improvement, to the same extent and in the same manner, that the State then held or might exercise such rights by virtue of the acts above referred to.

That such grant was made by chapter 98, Laws of 1853, and upon the condition that each of the members of said company should file with the secretary of state a bond in the sum of $25,000, conditioned to vigorously prosecute the said improvement to completion and complete the same within three years from the

passage of said act, and to pay all outstanding evidences of indebtedness on the part of the State as trustee or otherwise issued on account of said improvement, and to save harmless the State of Wisconsin from any and all liabilities in anywise arising or growing out of the said improvement, and upon condition that such company should procure releases of all claims and demands against the State of Wisconsin from certain contractors on the Fox and Wisconsin rivers improvement therein named.

And that as soon as the bond or bonds and releases referred to should be filed with the secretary of state the said company should be authorized to take possession of said improvement, appurtenances, property, and assets thereby granted unto them.

That within the time provided by said act making said grant the corporators therein named fully complied with the said conditions precedent and filed with the secretary of state the bonds and releases referred to, and that on the 20th day of July, 1853, the secretary of state of Wisconsin made his certificate of the filing of said bonds and releases and of his approval thereof, whereupon all of said dams, locks, canals, water powers, and other appurtenances of said works and all of said rights, powers, and franchises passed to and vested in the said Fox and Wisconsin Improvement Company.

That among the property which so passed to and vested in the said Fox and Wisconsin Improvement Company were the said canals, locks, and dam in town. 21, range 18, and the hydraulic power furnished by said dam; that said dam and canals were then nearly completed.

That pursuant to the conditions of said grant to said Fox and Wisconsin Improvement Company, and to carry out the intention of the Congress of the United States in making said grant to the State of Wisconsin, the said Fox and Wisconsin Improvement Company proceeded to the entire completion of said works as then contemplated and as enlarged by acts of the Legislature of Wisconsin, being chapter 98 of Laws of 1853 and chapter 112 of Laws of 1856, and to that end expended several millions of dollars and paid on account of State indebtedness of the State of Wisconsin several hundred thousand dollars.

That said dam furnished from the mill pond sustained by the same a large and very valuable hydraulic power, which is one of the powers mentioned in the act of the State of Wisconsin approved August 8th, 1848, and also mentioned in the second section of the act of the State of Wisconsin approved July 6th, 1853, and was a part of the consideration for which the operators of the Fox and Wisconsin Improvement Company gave their bonds and procured the releases above mentioned.

That, in the belief that they owned such hydraulic power, the said Fox and Wisconsin Improvement Company bought lands adjacent to said canal for the purposes of rendering said hydraulic power available and enabling themselves and their assigns or lessees to make use of the same.

That, as this plaintiff is informed and believes, the said Fox and

Wisconsin Improvement Company would not have complied with the conditions of said grant and taken title to the property therein named upon the conditions of said grant if they had not believed that they thereby became the owners of the hydraulic power furnished by said dam and mill pond and others of a like character and whose ownership depended upon the same facts and conditions.

That without the ownership of such hydraulic powers so reserved to and appropriated by the State of Wisconsin by the act of Aug. 8, 1848, and granted to the Fox and Wisconsin Improvement Co. by the act of July 6, 1853, neither the State of Wisconsin nor the Fox and Wisconsin Improvement Company would have been able to secure the completion of said improvement of the Fox river in the manner or to the extent to which it was improved by them.

That the ownership of such hydraulic powers was an essential and necessary fund or property to enable the State and said Fox and Wisconsin Improvement Company and its grantee, this plaintiff, to complete and maintain said improvement.

That the said Fox and Wisconsin Improvement Company, in order to raise funds for the completion of said work and the payment of State indebtedness on account of the same, made its certain mortgage, bearing date August 1st, 1853, to Isaac Seymour and William J. Averill, mortgagees in trust, to secure the bonds of said company to the amount of five hundred thousand (500,000) dollars, by which mortgage it mortgaged all the property of said company.

And that thereafter the company sold and delivered a large number of said bonds, but how many the plaintiffs are unable to state.

That the Legislature of Wisconsin, by an act approved October 3d, 1856, in order to secure the enlargement and immediate completion of the improvement before mentioned and the payment of the evidences of indebtedness issued by the State on account of the same and to enable the Fox and Wisconsin Improvement Company to perform the duties required of it by said act, enacted that within ninety days after the passage of said act said company should make a deed of trust to three trustees of all the unsold lands granted to the State of Wisconsin to aid in the improvement of the Fox and Wisconsin rivers and all the works of improvement constructed or to be constructed on said rivers, and all and singular the rights of way, dams, locks, canals, water powers, and other appurtenances of said works, and all rights, privileges, franchises belonging to said improvement, and all the property of said company, of whatever name and description, for the uses, trusts, and purposes named in said act, which were, first, to secure to the State the faithful application of all moneys or property arising from the sale of the lands or water powers or obtained on the faith of the same to the construction and completion of the works of improvement contemplated in the said act and as therein provided, being the same works as those specified in said act of Congress making grant of lands to the State of Wisconsin, and to the payment of all outstanding evidences of indebtedness issued by the State on account of said improvement.

That immediately thereafter said act was accepted and ratified by said Fox and Wisconsin Improvement Company, and on the 1st day of December, 1856, said improvement company made its deed of trust to trustees selected and approved pursuant to said act, which said trustees were Alexander Mitchell, Charles Butler, and Alexander Spaulding.

That on the 12th day of December, 1856, the then Governor of Wisconsin certified that such deed had been made and that the same was in conformity to said act. Such deed provided for a further issue of bonds of said company to the amount of one million five hundred thousand (1,500,000) dollars, the proceeds of which should be expended for the purposes specified in said act of October 3d, 1856.

That thereafter Alexander Mitchell resigned his position
6 as trustee in said trust deed, and one Moses M. Davis was duly appointed in his place as his successor, and his appointment was ratified by said company.

That in September, 1863, the said Fox and Wisconsin Improvement Company had proceeded with the enlargement of said canal according to plan adopted by chapter 289 of Laws of 1861, and sold and issued nearly all of its bonds secured by said trust deed, and the interest had become due and payable upon the same and had not been paid, and that the indebtedness of the State secured by said trust deed had not been paid.

That thereupon the trustees then holding the estate granted by said trust deed, to wit, Alexander Spaulding, Charles Butler, and Moses M. Davis, proceeded to foreclose said trust deed in the circuit court for the county of Fond du Lac, for the purposes of paying the State indebtedness incurred on account of said work and the principal and interest of the bonds issued under such mortgage to Seymour and Averill and the principal and interest upon the bonds secured by said trust deed, and to secure a fund for the further enlargement and completion of said improvement, according to the provisions of chapter 289, Laws of 1861. Such proceedings were had therein.

That on the 4th day of February, 1864, judgement of foreclosure and sale of all said property under said trust deed was duly entered and recorded in said circuit court for the county of Fond du Lac.

That under and pursuant to said judgment all the lands and property of said company and all its rights, privileges, and franchises were sold for the purposes aforesaid.

That on such sale a committee of the persons proposing to become and who afterwards became incorporated under chapter 289 of the Laws of 1861 bid in and thereafter, when incorporated as this plaintiff, took the title to, and by such sale and the confirmation thereof and the conveyance of trustees under direction of the court thereunder this plaintiff became seized in fee of the works of improvement known as the Fox and Wisconsin improvement, together with all and singular the rights of way, dams, locks, canals, and other appurtenances of said works, the right of receiving tolls and rents for the same, and all the privileges of said works, and all other rights, powers, and privileges connected with said line of water

communication by the State of Wisconsin granted to and vested in the Fox and Wisconsin Improvement Co. and its trustees, or either, under and by virtue of the several acts of the Legislature of the State of Wisconsin in relation thereto, among which were the acts approved July 6, 1853, March 31st, 1855, and October 3d, 1856; also all other corporate rights, privileges, franchises, powers, and property, real and personal, vested in and belonging to said company, its trustees, or both, forming a part of or in any way connected with said improvement, of whatever name or nature and from whatever source derived, and all appurtenances thereunto appertaining, including and together with all strips or parcels of lands adjacent to said improvement or the water powers created thereby; also all of the water powers created by and upon the line of or connected with the work of the Fox and Wisconsin rivers improvement, at whatever points located and wherever situated; also all rights, titles, and interests in and to lands or other property acquired, with reference to said improvement and water powers, through leases and agreements of all kinds, including said dam and canal in town. 21, range 18, and all hydraulic power furnished thereby and the mill lots connected therewith.

That the consideration bid for such property by the said committee and paid by the company afterwards organized, to wit, this plaintiff, was the sum of $191,000.

That out of the same and other moneys arising from the sale of lands granted by Congress as aforesaid there was paid the amount of about $206,000 of State indebtedness incurred on account of such improvement, and the further sum of $43,971.15, being the amount in said suit adjudged necessary to complete the improvement of said Fox and Wisconsin rivers according to the provisions of chapter 289 of the Laws of 1861, which said sums were paid by said committee into the treasury of the State of Wisconsin or on certificates of State indebtedness surrendered to the State and cancelled.

That after said sale to said committee the parties represented by such committee formed a corporation called the Green Bay and Mississippi Canal Company, being this plaintiff, under and pursuant to said chapter 289 of the Laws of 1861, to wit, on August 15th, 1866; that by its articles of association said corporation accepted the rights, powers, privileges, franchises, capacities, immunities, exemptions, and burdens granted by and conferred under and imposed by said act and the acts amendatory thereof, and as such corporation received from said trustees, plaintiff in said action, by order of said circuit court of Fond du Lac county, conveyance of said rights, franchises, and property, which conveyance was executed on the 18th of August, 1866.

Thereafter this plaintiff, under such conveyance, entered
7 into possession of all such property and the exercise of all such franchises, and, pursuant thereto, spent large sums of money in improving, repairing, preserving, and operating said works of improvement, including said dam and canal and the water power connected therewith.

That the expenses of the maintenance of said water way and im-

provement largely exceeded the revenue derived therefrom, and that the maintenance of the same appearing to the United States Government to be important to make a competing line of communication, and for advantage in developing the Northwestern States and the commerce thereof, and to be of importance to the commerce of the nation, and more properly a public than a private enterprise, the Senate and the House of Representatives of the United States passed an act, approved July 7th, 1870, whereby, among other things, it was provided that the Secretary of War be authorized to adopt for the improvement of the navigation of the Wisconsin river such plan as might be recommended by the chief of the bureau of engineers, and that said Secretary of War ascertain what sum in justice ought to be paid to the Green Bay and Mississippi Canal Co. for all and singular its property and rights of property in said line of water communication, including its locks, dams, canals, and franchises, or so much of the same as shall in the judgment of said Secretary be needed.

That the Legislature of Wisconsin, by act approved March 23, 1871, authorized and empowered this plaintiff to sell and dispose of the rights and property of this plaintiff to the United States, as contemplated by said act of Congress.

That pursuant to such act of Congress a board of arbitrators was selected to appraise such property as therein provided; that said board of arbitrators determined the actual value of such property and rights of property of this plaintiff in said line of water communication, including its locks, dams, canals, franchises, and fixtures attending the operation and repair of the same, to be $1,048,070.00, and that the amount of money realized from the sale of lands heretofore granted by Congress to aid in construction of such line to be deducted from such actual value to be $723,070, leaving a balance of $325,000 to be paid to said company (this plaintiff) for all such property.

They also appraised the value of plaintiff's water powers and lots necessary to the enjoyment of same, subject to all rights to use the water for all purposes of navigation, at $140,000, and plaintiff's fixtures attending the operation and repair of the canal, being dredgeboats and other personal property, said arbitrators appraised at $40,000, same being parcel of the property valued at $1,048,070, and which might be thought not needed for public use; that said board of arbitrators reported their valuation to Secretary of War.

That pursuant to said act of Congress and the report of such arbitrators the Secretary of War made his report to Congress that said property was of the value of $325,000.

That the value of the water powers and lots necessary to the enjoyment of the same, subject to all rights to use the water for all purposes of navigation, was $140,000, including the franchise to use same.

That the value of the personal property of said company was $40,000.

That, in his opinion, the personal property, valued at $40,000, and the franchises of said corporation, to wit, the water powers cre-

ated by the dams and the lots necessary to the enjoyment of the same, subject to all rights to use the water for all purposes of navigation, were not required for purposes of navigation, and were therefore not needed by the United States.

That thereupon Congress made an appropriation, by act approved Jan. 10th, 1872, for the purchase of the right and property of said company, reported by said Secretary of War to be needed for the purposes of navigation, of $145,000, which sum was paid to this company on or about the 18th day of September, 1872. Whereupon this plaintiff conveyed to the United States of America certain of its franchises and property, as appears by its deed, the material parts of which appear in Schedule "A," hereto annexed.

That this plaintiff is the owner of and entitled to the exclusive use and control of the water power or hydraulic power supported and maintained and furnished by the above-mentioned dam across Fox river, subject only to the right of the United States Government to draw only so much water therefrom as is necessary to fill the canal on the north side of said river, leading from the pond above said dam to the river below said dam, for the purposes of navigation only, as specified in said conveyance from this plaintiff to the United States.

That the United States has the use and control of said canal, dam, and embankments appurtenant and of the water furnished thereby for purposes of navigation only, and this plaintiff has the right to the exclusive use of same and has title to and possession of same for purposes of using all surplus water drawn and to be drawn from said mill pond over and above the amount necessary for use in navigation.

That this plaintiff also owns vacant lots reaching from said canal to the river below said dam, convenient for use for mills run by hydraulic power drawn from the pond created by said dam, and large enough to make practical use thereon of all the hydraulic power furnished by said dam.

That the use of said surplus water drawn and to be drawn from said mill pond is of great value to this plaintiff, to wit, of the value of $100,000, to be used on plaintiff's lots aforesaid, and on such other lands and lots as plaintiff may purchase or as plaintiff may lease water to be used upon.

That the dam which supports, maintains, and furnishes such hydraulic power rests on the south side of said river, on lot No. 5 of the Government survey, and on the north side of said river upon lands in section 24, appropriated by the State to the use of said improvement and bought by the Fox and Wisconsin Improvement Company, and the title to which is now in this plaintiff in fee simple, subject to the rights of the United States under said conveyance from this plaintiff.

That said lot No. 5, where it abuts on said Fox river, is and in its natural condition was low and scarcely raised above the surface of the water in said river at its natural stage; and in order to maintain a useful stage or head of water in said pond for purposes of navigation or hydraulic power it was necessary to build and is neces-

commencing said canal this plaintiff gave notice in writing to the Kaukauna Improvement Company, under whose authority plaintiff believes said canal is being built, of the claim of this plaintiff to said hydraulic power and to said dam and its appurtenant embankments, and that this plaintiff would resist the breaking of said embankments and the drawing of water from said mill pond by the said Kaukauna Improvement Company, which company alone then claimed the right to break said banks and draw said water.

That the moneys expended by the State and Fox and Wisconsin Improvement Company and its trustees and this plaintiff were expended by them during their respective ownerships of said works of improvement upon the faith of their ownership of such hydraulic power.

That the defendant, The Kaukauna Water Power Company, claims to own that part of said lots 5, 6, and 7, in section 22, adjacent to Fox river and between same and line of Milwaukee, Lake Shore & Western Railroad Company.

That whatever title either of the defendants has in said lot 5, or any part thereof, is derived through and is dependent upon the title of Samuel Beardsley to the same, and is subject to the right of the plaintiff to maintain said dam and the above-mentioned embankment on the same.

That the title of the defendants, or either of them, to said lots 6 and 7, or any part thereof, is derived from and is dependent upon the title of John Hunt to the same, and is subject to the right of plaintiff to maintain thereon the embankment and ditch aforesaid.

That the defendant, The Kaukauna Water Power Company, has excavated and built a canal upon that part of lots 5, 6, and 7 which it claims to own, in order to draw water from said mill pond, on the south side of said river, and use same for hydraulic purposes, and return same to the river below said dam.

That said defendant, The Kaukauna Water Power Company, has broken said embankments on lots 6 and 7 since the giving of notice aforesaid, and has let the water of said mill pond from said river into said canal.

That said defendant threatens and if not restrained by order of this court will, as plaintiff believes, proceed to draw the water from said mill pond and use same for hydraulic power, and return same into said river below said dam, and thereby deprive this plaintiff of the use thereof and of the value of the use thereof and of the control of and dominion over same, and will thereby secure the location of mills, to be propelled by hydraulic power, on such canal which would otherwise be located on plaintiff's said canal, on the north side of said river, and from which mills plaintiff would derive large profits in rents of hydraulic power.

That in building and opening said canal on south side said defendant has cut, broken, torn away, and removed the embankment and drain built and dug and maintained as aforesaid by plaintiff and its grantors upon, along, and on said lot six for the space of about two hundred feet.

That said defendant claims the right to and threatens to, and will,

as plaintiff believes, unless restrained by order of this court, interfere with and prevent this plaintiff by force from rebuilding and continuing and maintaining the bank or embankment and drain constructed and heretofore maintained by plaintiff and its grantors on, upon, and over said lot six (6).

That all of said defendants, except the Kaukauna Water Power Company, claim some right to use water from said canal of said Kaukauna Water Power Co. for hydraulic power under and as tenants of said Kaukauna Water Power Company under contracts, deeds, or leases, the contents of which this plaintiff cannot ascertain.

That no personal claim is made against any of said defendants except said Kaukauna Water Power Company.

Wherefore this plaintiff prays judgment of this court for costs against the Kaukauna Water Power Company and perpetually enjoining and restraining the defendants and all and singular their agents, servants, and employees from interfering by force with this plaintiff and its servants, agents, and employees while engaged in maintaining, repairing, or rebuilding said embankment and drain over, on, and upon lot six, and from in any way hindering or preventing this plaintiff, its servants, agents, or employees, in the repairing, rebuilding, and maintaining said embankment and drain, and enjoining and restraining said defendants, their agents, servants, and employees, from in any way interfering with or cutting, breaking, tearing away, or removing said embankment or drain on lot 6.

And commanding the defendant, The Kaukauna Water Power Company, to rebuild and restore to its former state and condition the embankment and drain on said south bank of said river upon and across said lot 6.

And also perpetually enjoining and restraining the defendants and all and singular their agents, servants, and employees from drawing any water from said mill pond for hydraulic purposes or any other purpose than the ordinary use for agriculture.

And this plaintiff prays that pending this action the defendants, their agents and servants, be restrained as aforesaid.

MOSES HOOPER,
Plaintiff's Attorney.

E. MARINER,
BREESE J. STEVENS,
Of Counsel.

STATE OF WISCONSIN, } ss:
Outagamie County, }

Henry J. Rogers and Aug. Ledyard Smith, being each separately sworn, doth each for himself depose and say that said Rogers is vice-president and said Smith is secretary and treasurer of the Green Bay and Mississippi Canal Company.

That John Van Nortwick is president of said company, and that said Van Nortwick is not a resident of nor present within the State of Wisconsin; that he, the said deponent, has read the foregoing complaint in the foregoing-entitled action and knows the contents

thereof; that all of the allegations therein contained are true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes them to be true.

Subscribed and sworn to before me this — day of December, A. D. 1885.

——— ———,

Notary Public, Outagamie Co., Wis.

11 EXHIBIT "A."

* * * Now, therefore, this indenture witnesseth: That in consideration of the premises and fully to comply with the requirements of the act of Congress approved July seventh, eighteen hundred and seventy, and to accomplish the intents and purposes thereof, and in consideration of the sum of one hundred and forty-five thousand dollars paid by the United States of America to the said party of the second part, the receipt whereof is hereby acknowledged, the Green Bay and Mississippi Canal Company, the said party of the first part, hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell, unto the said United States of America, the party of the second part, the following-described property, rights, franchises, etc., situate in the State of Wisconsin, and described as follows, to wit: All and singular its property and rights of property in and to the line of water communication between the Wisconsin river aforesaid and the mouth of the Fox river, including its locks, dams, canals, and franchises, saving and excepting therefrom and reserving to the said party of the first part the following-described property, rights, and portions of franchises, which, in the opinion of the Secretary of War and of Congress, are not needed for public use, to wit:

First. All the personal property of said company and particularly all of such property described in the list or schedule attached to the report of said arbitrators and now on file in the office of the Secretary of War, to which reference is here made, whether or not such property be appurtenant to said line of water communication.

Second. Also all that part of the franchises of said company, viz., the water powers created by the dams and by the use of the surplus water not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto, and the lots, pieces, or parcels of land necessary to the enjoyment of the same and those acquired with reference to the same, all subject to the right to use the water for all purposes of navigation, as the same is reserved in leases heretofore made by said company, a blank form of which, attached to the said report of said arbitrators, is now on file in the office of the Secretary of War, and to which reference is here made, and subject also to all leases, grants, and assignments made by said company, the said lease, etc., being also reserved herefrom, together with all and singular the hereditaments and appurtenances unto the above granted and described property, rights, and franchises, not so saved and excepted or reserved, belonging to or in any way appertaining, and all the estate, right, title, interest, claim, or demand whatsoever of the said party of the first part, either in law or equity,

either in possession or expectancy, of, in, and to the above-granted property, rights, and franchises not so saved, excepted, or reserved, and their hereditaments and appurtenances; to have and to hold the above granted and described property, rights, and franchises, not saved, excepted, or reserved as aforesaid, and every part and parcel thereof, together with the hereditaments and appurtenances thereto belonging, unto said United States of America, party of the second part, its successors and assigns, forever.

12 [Endorsed:] State of Wisconsin. Circuit court, Outagamie county. The Green Bay and Mississippi Canal Company, plaintiff, *vs.* The Kaukauna Water Power Co., Bradner Smith & Co., Jas. C. Delaney, Charles D. Cased, David McCartney, James H. Elmore, Joseph Klein, The Milwaukee, Lake Shore & Western Railway Company, and Badger Paper Company, defendants. Complaint. Moses Hooper, plaintiff's attorney. E. Mariner, Breese J. Stevens, of counsel. Filed Jan. 12, 1886. F. C. Friedrick, clerk. Filed July 22, '87. Clarence Kellogg, clerk sup. c't Wis.

13 In Circuit Court, Outagamie County, Wisconsin.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY, Plaintiff,

against

KAUKAUNA WATER POWER COMPANY, BRADNER, SMITH & COMPANY, JAMES C. DELANEY, CHARLES D. CASED, DAVID MCCARTNEY, JAMES H. ELMORE, JOSEPH KLEIN, MILWAUKEE, LAKE SHORE & WESTERN RAILWAY COMPANY, AND BADGER PAPER COMPANY, B. AYMER SANDS, TRUSTEE, DEFENDANTS.

The above-named defendants, Kaukauna Water Power Company, Bradner, Smith & Co., Milwaukee, Lake Shore & Western Railway Company, and Badger Paper Company, by Alfred L. Cary, their attorney, answer the complaint of the plaintiff and state that all of said defendants (except the said Kaukauna Water Power Company) are either tenants of or hold and claim under the said defendant, The Kaukauna Water Power Company, and in privity with it. These defendants deny that the State of Wisconsin, by the act of August 8th, 1848, or by any other act or in any other way, undertook the improvement of the Fox and Wisconsin rivers, except as trustee or general director of such improvement, and these defendants state that the board of public works mentioned in said complaint and in said act of 1848, as well as all other officers mentioned in said last-mentioned act, were, by the forty-sixth section thereof, required to be paid out of the moneys realized from the lands so by said act of August 8th, 1848, granted to the State and the revenues derived from such works of improvement.

And these defendants state that the State of Wisconsin was and is, in and by its constitution, absolutely prohibited from ever contracting any debt for works of internal improvement and from ever being a party in carrying on such works, except that whenever grants

of land or other property should have been made to the State especially dedicated by the grant to particular works of internal improvement the State might carry on such particular works and devote thereto the avails of such grants and might pledge or appropriate the revenues derived from such works in aid of their completion.

And these defendants, upon information and belief, state that none of the lands so by Congress granted to aid in the improvement of said Fox and Wisconsin rivers were situated or located in either lots five, six, or seven, in section 22, south of the river, or in section 24, on the north side of said river, and that none of said granted lands bordered upon or touched the Fox river in township 21, range 18 east, and that the State of Wisconsin did not then, to wit, on the 8th of August, 1848, or at any time after that, own or have title to any land on the south side of said Fox river lying or being in said lots 5, 6, or 7, in said section 22, in the said complaint mentioned, and that the State of Wisconsin did not on the 8th of August, 1848, or previous thereto, have title to or own any land on the north side of said Fox river lying or being in said section 24.

And these defendants state that the sixteenth section of the said act of August 8th, 1848 (from which is quoted in said complaint at folio six (6) one sentence only), reads as follows: "When any land, waters, or materials appropriated by the board to the use of said improvements shall belong to the State, such lands, waters, or materials and so much of the adjoining land as may be valuable for hydraulic or commercial purposes shall be absolutely reserved to the State, and whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers such water power shall belong to the State, subject to future action of the Legislature."

14 And these defendants deny all that part of said complaint, in folios six and seven thereof, which is in these words:

"By this act the State of Wisconsin appropriated to its own use and the use of its assigns and successors the water power of the said Fox river, which should thereafter be made available by dams erected in the business of improving said Fox river; that such appropriation was necessary to secure the improvement of said rivers and to prevent the application of the proceeds of the public lands granted as aforesaid from being expended upon dams which should furnish hydraulic power to private parties, owners of the lands bordering on the banks of said Fox river, and thus be substantially diverted from the use for which they had been granted."

And these defendants state that they have neither knowledge nor information sufficient to form a belief as to whether the value of said water powers has been expended in improving the navigation of said rivers within the intention of said act of Congress, as in said complaint is alleged.

And these defendants deny that the State of Wisconsin built the dam, canal, and locks mentioned in the eighth folio of said complaint, and, on the contrary thereof, allege that said original dam in the complaint mentioned, canal and locks, were constructed by and

under the control of the "board of public works," as provided in and by section one of said act of August 8, 1848.

And these defendants deny that the State of Wisconsin, in July, 1853, or at any other time, found itself unable to fully complete said works of improvement from the grant made by the United States and the hydraulic powers created by dams built under said act; and they also deny that the State of Wisconsin had then or ever become indebted for moneys spent upon such improvement, or that it, the State of Wisconsin, ever became or was involved in unfulfilled contracts, payments on which it could not make from funds derived from said land grants or other funds or property applicable thereto. On the contrary thereof, the said State simply changed its policy as to the administration of said trust fund, and thereupon incorporated the said Fox and Wisconsin Improvement Company at the time and for the purpose in said complaint, at folio 11, stated, to wit, for the purpose of completing such improvement, but not for the purpose of relieving the State of its indebtedness on account of work theretofore done on the same or liability on contracts not then executed, and only because of such change of policy did the State transfer to the Fox and Wisconsin Improvement Company the said property and trust estate mentioned at folios eleven and twelve in said complaint.

And these defendants further allege that it was provided in and by said chapter 98 of the Laws of 1853 that nothing contained in said act should be construed as an admission of any indebtedness or liability on the part of or against the State growing out of or connected with any contract theretofore made for the construction or repair of any of the works of improvement on the Fox and Wisconsin rivers.

And these defendants deny that all the hydraulic power furnished by the said dam so built in township 21, range 18, passed to said Fox and Wisconsin Improvement Company by said transfer of 1853 or in any other way, and, on the contrary thereof, state upon information and belief that none of the hydraulic or water powers upon or appurtenant to the south or southerly shore or bank of said river and furnished by said dam ever passed to or were owned by said Fox and Wisconsin Improvement Company.

And these defendants state that they have no knowledge or information sufficient to form a belief as to how much money the said improvement company expended in or towards the completion of said works, but these defendants deny that the State of Wisconsin was ever indebted upon account thereof, and they also deny that the Fox and Wisconsin Improvement Company ever paid on account of state [said] indebtedness of the State of Wisconsin several hundred thousand dollars or any sum or amount whatever; and they state that whatever said improvement company did pay in that behalf was upon debts contracted by said board of public works, contracted solely upon the faith and credit of the said trust estate.

And these defendants state that they have no knowledge or information sufficient to form a belief as to whether those parts or

portions of said complaint in folios 18, 19, 20, and 21 are true or not, to wit, those parts in these words and figures, viz:

"Which is one of the powers mentioned in the act of the State of Wisconsin approved Aug. 8," 1848, and also mentioned in the second section of the act of the State of Wisconsin approved July 6, 1853, and was a part of the consideration for which the corporators of the Fox and Wisconsin Improvement Company gave their bonds and procured the releases above mentioned.

15 "That in the belief that they owned such hydraulic power the said Fox and Wisconsin Improvement Company bought land adjacent to said canal for the purpose of rendering said hydraulic power available and enabling themselves and their assigns or lessees to make use of the same."

"That, as this plaintiff is informed and believes, the said Fox and Wisconsin Improvement Company would not have complied with the conditions of said grant and taken title to the property therein named upon the conditions of said grant if they had not believed that they thereby became the owners of the hydraulic power furnished by said dam and mill pond, and others of a like character, and whose ownership depended upon the same facts and conditions."

"That without the ownership of such hydraulic powers so reserved to and appropriated by the State of Wisconsin by the act of August 8th, 1848, and granted to the Fox and Wisconsin Improvement Co. by the act of July 6, 1853, neither the State of Wisconsin nor the Fox and Wisconsin Improvement Company would have been able to secure the completion of said improvement of the Fox river in the manner or to the extent to which it was improved by them."

"That the ownership of such hydraulic powers was an essential and necessary fund or property to enable the State and said Fox and Wisconsin Improvement Company and its grantee, this plaintiff, to complete and maintain said improvement."

And these defendants, further answering, state that they have no knowledge or information sufficient to form a belief as to whether said Fox and Wisconsin Improvement Company ever sold or delivered a large number of the bonds of said company or any of the bonds of said company issued under or secured by its alleged mortgage of date August 1st, 1853, and these defendants, in relation thereto, upon information and belief, state that if any such bonds were ever issued, sold, or delivered by said improvement company that the same were not, nor was any of them, sold or delivered until after the 8th of June, 1855.

And these defendants, further answering, deny that on the foreclosure sale set out in said complaint at folios 31, 32, 33, and 34 the said committee took title to, or that said plaintiff, under said foreclosure or in any other way or manner, took or obtained title of any kind to any strips or parcels of land adjacent to said improvement on the south side of Fox river, in lots five, six, or seven, mentioned in said complaint, other than or aside from the easement released by the said John Hunt to the said Fox and Wisconsin Improvement Company and referred to in said complaint at folio 55 thereof; and these defendants also deny that on such foreclosure sale the said

committee or said plaintiff, by or through such foreclosure or sale, or otherwise, ever took or obtained title to all of the water powers created by or upon the line of or connected with the work of said improvement company.

And these defendants deny that out of the proceeds of said mortgaged property was paid any sum or amount of State indebtedness. Whatever was so paid was upon indebtedness which had been incurred upon the faith and security of said trust property solely, and for which the State was in no way liable or responsible.

And these defendants, further answering, say that the said plaintiff never, by any agent, servant, lessee, or officer or other person, after the 17th of August, 1866, or at any other time, entered into possession of or used any of the water power furnished by said dam on the south or southerly side of the Fox river, and that none of the water power furnished by said dam was ever used upon said lots No. 5, 6, or 7, in the complaint mentioned, until the same was so appropriated and used by this defendant, The Kaukauna Water Power Company; and these defendants, further answering, state that whether the maintenance of said water-way ever appeared to the United States Government to be more properly a public rather than a private enterprise these defendants have no knowledge or information sufficient to form a belief; but these defendants, upon information and belief, state that, because of the fact that the expenses of maintaining said water-way did largely exceed the revenues derived therefrom, said plaintiff induced the United States Government to take the same off the hands of the plaintiff at a highly remunerative compensation.

And these defendants further state, upon information and belief, that the whole of the deed to the United States mentioned in fol. 45 of the complaint is material, and is to this answer annexed and made part thereof, marked Exhibit No. 1.

And these defendants deny that the said plaintiff is or at the time of the commencement of this suit was the owner of and entitled to the exclusive use and control of the water power or hydraulic power supported, maintained, and furnished by the
16 said dam, subject only to the rights of the United States Government, as stated at folio 46 in and of said complaint; and they further deny that the plaintiff has or ever had title to or possession of said canal, dam, and embankments for the purpose of using all surplus water drawn or to be drawn from said pond over and above the amount necessary for use in navigation.

And these defendants state that the said plaintiff does not and never did own or have any interest in, as lessee or otherwise, any land or lots, vacant or otherwise, lying on the south or southerly bank, shore, or side of said Fox river in either of said lots five, six, or seven or upon which it could use, on said south side of the river, any of said water so raised by said dam.

And these defendants, further answering, say that said lots number five, six, and seven prior to August, A. D. 1835, were owned in fee by the United States; that on or about the first day of September, 1835, said Samuel Beardsley, in the complaint mentioned, pur-

chased said lot five from the United States and received a duplicate therefor. The same lot was afterwards patented upon said entry, and these defendants hold and claim title under and in privity with said Beardsley.

That said lots six and seven were sold by the United States to one Denniston on or about the 1st day of September, 1835, and a duplicate was then delivered to him therefor dated said last-mentioned day. The same lots were afterwards patented upon said entry, and these defendants hold and claim title under and in privity with said Denniston, their title coming through the said John Hunt in said complaint mentioned.

And these defendants state that they have no knowledge or information sufficient to form a belief as to whether the title in fee simple or otherwise of and to the land in said section 24, upon which the northerly end of said dam abuts, is or ever was in the said plaintiff.

And these defendants, upon information and belief, state that neither the State of Wisconsin, the Fox and Wisconsin Improvement Company, nor said trustees, while they possessed said dam respectively or at any other time, claimed the right to have or enjoy all the water power created by said dam and embankment for their own use or benefit or the right to lease or to sell the same, as in said complaint alleged.

And these defendants state that they have no knowledge or information sufficient to form a belief as to whether said Samuel Beardsley ever granted to the State of Wisconsin and its assigns or either of them the right to build and forever maintain said dam and embankments on said lot five, or whether said Beardsley ever waived condemnation or appraisal of damages of his land or riparian rights, parcel thereof and appurtenant thereto, as in said complaint alleged.

And these defendants, further answering said complaint, state that the only transfer or conveyance ever made by said John Hunt to said Fox and Wisconsin Improvement Company was dated and acknowledged on the 6th of October, 1854, and was worded as follows, viz:

"For and in consideration of one hundred dollars to me in hand paid, the receipt whereof is hereby acknowledged and confessed, I hereby, for myself, my heirs, executors, administrators, and assigns, release to the Fox and Wisconsin Improvement Company and their legal representatives the right to erect and forever maintain an embankment of the dimensions as surveyed by the engineer of said company, reserving to myself the right to use said embankment when completed, but not so that the same shall be injured, through lots six (6) and seven (7), in section twenty-two (22), of township twenty-one (21) north, of range eighteen (18) east, on the east side of the Fox river; also the privilege of excavating a ditch along the south or east side of said embankment not exceeding three feet in width and upon the south or east side of the said survey and stakes as set by said engineer."

And these defendants deny each and every allegation contained

in said complaint in folios 61 and 62 thereof, in the words following, viz: "That during all the time since the building of said dam in 1851 the State of Wisconsin, the Fox and Wisconsin Improvement Company, its trustees under said trust deed, and this plaintiff have notoriously, openly, and in the most public manner, and to the knowledge of all riparian owners on said river claimed, exercised, and proclaimed dominion and control over and title to and ownership of all the hydraulic power or water power furnished by said dam and by all other dams on said river built and maintained by them from time to time and all the time as each has been successively the owner and holder of the franchises granted to improve the said Fox and Wisconsin rivers, and which dominion, control, and claim of title and ownership have heretofore been acquiesced in and not questioned nor interfered with by the defendants or any of the persons through whom they or either of them claim title to the lands bordering on said river until the commencement of their canal, hereinafter described, about five years ago."

17 And these defendants further state that they have no knowledge or information sufficient to form a belief as to whether the following allegation in said complaint is true or not, viz: "That the moneys expended by the State and Fox and Wisconsin Improvement Company and its trustees and this plaintiff were expended by them during their respective ownerships of said works of improvement upon the faith of their ownership of such hydraulic power."

And these defendants, further answering said complaint, state that the said defendant, Kaukauna Water Power Company, has opened said embankment mentioned in the complaint at about the point stated and put into its said canal, which there opens into the said Fox river, substantial bulk-heads and head-gates of sufficient height, depth, and strength to retain the water of said pond in its banks and embankments as constructed by the said plaintiff and its grantors and grantees, and through which to draw (subject to all rights or wants for purposes of navigation) the one-half of the water raised or retained by said dam, which said one-half of the water of said Fox river the said Kaukauna Water Power Company claims the right to thus draw and so use by virtue of its said ownership of the south or southerly shore of said river at, above, and below the point of abuttal of the south or southerly end of said dam upon the shore, and that none of these defendants have ever taken or drawn through or into said canal of the said Kaukauna Water Power Company more than one-half of the water of said river, and have never and do not now claim the right so to do, and these defendants do claim the right to prevent said plaintiff from closing the said canal of said Kaukauna Water Power Company or restoring the said embankment or river bank across or in front of the mouth of the same or in any way interfering therewith to the prevention of defendants from taking water through the same to the extent above in this answer claimed, so long as these defendants maintain in good condition and repair said bulk-heads, head-gates, and embank-

ment to the full height of said Government dam, and so long as these defendants take no more water from said pond than belongs to them as aforesaid.

And these defendants deny that either the plaintiff, the Fox and Wisconsin Improvement Company, or the State of Wisconsin ever had or owned any water, right to water, or water power (except for the purpose of navigation) upon or along said Fox river, except as riparian owners; and these defendants, upon information and belief, state that the State of Wisconsin never had authority under its constitution to acquire, by purchase, condemnation, or otherwise, or to accept or receive title to any land or water or water power along or upon said Fox river, except for the purposes of navigation, and that it never had any right, power, or authority to take or condemn private property for the purpose of milling or manufacturing of any kind or for the purpose of transfer or sale or lease thereof to others for any purpose other than navigation.

And these defendants, further answering, state that the dam which now raises the water of said Fox river for the filling of said Government canal, in the said complaint mentioned, is not the same dam which was built by the board of public works and in said complaint referred to; that after the United States became the owner of said canal and water-way, and in about the year 1874, the United States abandoned said old dam and built a new one, the northerly end of which abuts on land in said section 24 and about ninety (90) feet down stream or easterly from the point where the said old dam abutted on the shore, and the southerly end of which new dam abuts on said lot five (5), section twenty-two, about sixty (60) feet down stream and easterly from where the said old dam abutted, the southerly half of which said new dam and which point of abuttal is upon land which prior to and at the time of the commencement of this suit belonged to and was in possession of and still belongs to and is in the possession of the defendant, The Kaukauna Water Power Company, its title thereto being in fee and derived from and through the said Samuel Beardsley, as hereinbefore and in said complaint alleged; that after the building of said new dam by the United States as aforesaid it (the said United States) constructed and extended the said embankment along the southerly shore of said Fox river, on said lot 5, from the said old dam down stream to and joined and terminated the same upon its said new dam, as the same is now in use; and these defendants state, upon information and belief, that neither the United States or any other party ever by purchase, condemnation, dedication, or in any other way acquired of or from the owner of said lot five the right to so construct or abut said new dam upon said lot five, or to so lengthen or construct said new part of said embankment thereupon, but that, on the contrary thereof, the United States, by its officers and agents, placed the southerly half of and the southerly abuttal of said new dam and said new part of said embankment upon said lot five without the knowledge

18 or consent of the owner of that part of said lot five upon which said new dam and embankment were so constructed as aforesaid.

ALFRED L. CARY,
Attorney for said Defendants, Kaukauna Water Power Company, Bradner Smith & Company, Milwaukee, Lake Shore and Western Railway Company, and Badger Paper Company.

DAVID S. ORDWAY,
Of Counsel.

STATE OF WISCONSIN, } ss:
County of Milwaukee, }

Joseph Vilas, being duly sworn, says he is the president and an officer of the defendant, Kaukauna Water Power Company; that he has read the above and foregoing answer and knows its contents, and that the same is true except as to those matters stated on information and belief, and as to those matters he believes it to be true.

—— ——.

Subscribed and sworn to before me this — day of February, A. D. 1886.

—— ——.

EXHIBIT No. 1.

This indenture, made this eighteenth day of September, in the year of our Lord one thousand eight hundred and seventy-two, between the Green Bay and Mississippi Canal Company, a corporation existing under the laws of the State of Wisconsin, of the first part, and the United States of America, of the second part.

Whereas, in and by an act of Congress entitled "An act for the improvement of water communication between the Mississippi river and Lake Michigan, by the Wisconsin and Fox rivers," approved July 7th, 1870, to which reference is here made, the Secretary of War was authorized to ascertain, at any time he should deem proper within three years from the passage of said act, the sum which ought in justice to be paid to the Green Bay and Mississippi Canal Company, a corporation existing under the laws of Wisconsin, as an equivalent for the transfer of all and singular its property and rights of property in and to the line of water communication between the Wisconsin river aforesaid and the mouth of Fox river, including its locks, dams, canals, and franchises, or so much of them as should in the judgment of said Secretary be made, and to that end he was authorized to join with said company in appointing a board of disinterested and impartial arbitrators, one of whom should be selected by the Secretary aforesaid, another by said company, and the third by the two arbitrators so selected; and

Whereas a board of arbitrators, duly constituted and acting under

and pursuant to said act of Congress, did duly find and report to the said Secretary of War, by their report in writing, bearing date on the fifteenth day of November, eighteen hundred and seventy-one, that the sum which in justice ought to be paid to said company as an equivalent for the transfer of all and singular its property and rights of property in and to the line of water communication aforesaid, including its locks, dams, canals, and franchises, was the sum of three hundred and twenty-five thousand dollars, and did further find and report that whereas, under the act of Congress aforesaid, the Secretary of War might in his judgment decide that the personal property of the said company might not be needed, and that a part of the franchises of said company, viz., the water powers erected by the dams and by the use of the surplus waters not required for purposes of navigation, might not be needed, the value of such personal property was the sum of forty thousand dollars, and the value of such water power and lots necessary to the enjoyment of the same,

19 subject to all rights to use the waters for purposes of navigation, as the same is reserved in all leases made by said company, and subject also to all leases, grants, and assignments made by said company, was the sum of one hundred and forty thousand dollars, which said sum was to be deducted from the said sum of three hundred and twenty-five thousand dollars in case the said Secretary or Congress should determine that said water powers were not needed for public use, and which said sum of forty thousand dollars should also be deducted from said sum of three hundred and twenty-five thousand dollars in case said Secretary or Congress should determine that the said personal property was not needed for public use; and

Whereas the said the Secretary of War did, pursuant to said act of Congress, duly make his report in writing to Congress, bearing date on the 8th day of March, A. D. 1872, wherein and whereby he did, among other things, report in substance as follows, to wit:

The secretary is of opinion that the personal property appraised by said arbitrators at forty thousand dollars is not needed for public use.

He is further of opinion that the franchises of said corporation that are appraised by said arbitrators at the sum of one hundred and forty thousand dollars are not required for the purposes of navigation, and are therefore not needed. Deducting the above valuation of property, franchises, &c., which, in the opinion of the Secretary, are not "needed" within the meaning of that word as used in said act, the valuations of the remaining property, franchises, &c., as found by said arbitrators, is one hundred and forty-five thousand dollars. The Secretary reports to Congress that all the property, franchises, &c., so valued at one hundred and forty-five thousand dollars are needed for purposes of navigation, and that said amount of one hundred and forty-five thousand dollars is the sum which, in his opinion, ought in justice to be paid to such corporation as an equivalent for the transfer to the United States of said property, franchises, &c., so needed; and

Whereas, under and by an act of Congress entitled "An act mak-

ing appropriations for the repair, preservation, and completion of certain public works on rivers and harbors, and for other purposes," approved the 10th* day of June,* A. D. 1872, Congress, at its then present session, did duly elect to take such property by making an appropriation to pay the amount awarded in the following language, to wit: "For payment to the Green Bay and Mississippi Canal Company for so much of all and singular its property and rights of property in and to the line of water communnication between the Wisconsin river and the mouth of Fox river, including its locks, dams, canals, and franchises, as were, under the act of Congress for the improvement of water communication between the Mississippi river and Lake 'Michigan,' by the Wisconsin and Fox rivers, approved July seventh, eighteen hundred and seventy, reported by the Secretary of War to be needed, in his communication to the House of Representatives dated March eighth, eighteen hundred and seventy-two, one hundred and forty-five thousand dollars:"

Now, therefore, this indenture witnesseth: That in consideration of the premises and fully to comply with the requirements of the said act of Congress, approved July seventh, eighteen hundred and seventy, and to accomplish the intents and purposes thereof, and in consideration of the sum of one hundred and forty-five thousand dollars paid by the United States of America, the said party of the second part, the receipt whereof is hereby acknowledged, the Green Bay and Mississippi Canal Company, the said party of the first part, hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell, unto the said The United States of America, the party of the second part, the following-described property, rights, franchises, &c., situate in the State of Wisconsin and described as follows, to wit: All and singular its property and rights of property in and to the line of water communication between the Wisconsin river aforesaid and the mouth of the Fox river, including its locks, dams, canals, and franchises, saving and excepting therefrom and reserving to the said party of the first part the following-described property, rights, and portion of franchises, which, in the opinion of the Secretary of War and of Congress, are not needed for public use, to wit:

First. All of the personal property of the said company, and particularly all of such property described in the list or schedule attached to the report of said arbitrators, and now on file in the office of the Secretary of War, to which reference is here made, whether or not such property be appurtenant to said line of water communication.

Second. Also all that part of the franchise of said company, viz., the water powers created by the dams and by the use of the surplus waters not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto, and the lots, pieces, or parcels of land necessary to the enjoyment of the same and those acquired with reference to the same, all subject to the right to use the water for all purposes of navi-

*[The words "10th" and "June" appear on the record in pencil, apparently inserted after instrument was recorded.—Register.]

gation, as the same is reserved in lease heretofore made by said company, a blank form of which, attached to the said report of said arbitrators, is now on file in the office of the Secretary of War, and to which reference is here made, and subject also to all leases, grants, and assignment made by said company, the said leases, &c., being also reserved therefrom, together with all and singular the hereditaments and appurtenances unto the above granted and described property, rights, and franchises, not so saved, excepted, or reserved, belonging or in anywise appertaining, and all the estate, right, title, interest, claim, or demand whatsoever of the said party of the first part, either in law or equity, either in possession or expectancy, of, in, and to the above-granted property, rights, and franchises, not so saved, excepted, or reserved, and their hereditaments and appurtenances:

To have and to hold the above granted and described property, rights, and franchises not saved, excepted, or reserved as aforesaid and every part and parcel thereof, together with the hereditaments and appurtenances thereunto belonging, unto the said The United States of America, party to [of] second part, its successors and assigns, forever.

In witness whereof the party of the first part hath hereunto caused its corporate seal to be affixed and these presents to be subscribed by its president and attested by its assistant secretary *pro tempore* on the day of the date of these presents.

[Corporate Seal of G. B. and Miss. Canal Co.]

SAMUEL MARSH,
President of the Green Bay and Mississippi Canal Company.

Attest: HENRY C. BLAKE,
Assistant Secretary pro tempore of Green Bay and Mississippi Canal Co.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On this eighteenth day of September, A. D. 1872, before me, the undersigned, a commissioner in and for the State of New York, residing in the city and county of New York, duly appointed by the Governor, and under the laws of the State of Wisconsin, to take acknowledgment and proof of deeds and to administer oaths, etc., to be recorded or used in the said State of Wisconsin, personally came Samuel Marsh, whom I know to be the person described in and who executed the within deed of conveyance as president of the Green Bay and Mississippi Canal Company, and whom I know to be such president, who, being by me duly sworn, did then and there depose and say that he resides in said State of New York; that he is the president of the Green Bay and Mississippi Canal Company; that he signed the within deed of conveyance as such president and caused the common and corporate seal of said company, to him well known, to be affixed thereto, by order and authority of said company, as the act and deed of said company, for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my seal this 18th day of September, A. D. 1872.

[Comm. Wisconsin Seal for N. Y.]

J. B. NONES,
Commissioner for Wisconsin in and for New York,
No. 91 Duane St., Cor. Broadway.

21 STATE OF NEW YORK, } ss:
City and County of New York, }

On this eighteenth day of September, A. D. 1872, before me, the undersigned, a commissioner in and for the State of New York, residing in the city and county of New York, duly appointed by the Governor, and under the laws of the State of Wisconsin, to take the acknowledgment and proof of deeds and to administer oaths, &c., to be recorded or used in the State of Wisconsin, personally came Henry C. Blake,* whom I know to be the person described in and who attested the within deed of conveyance as assistant secretary *pro tempore* of the Green Bay and Mississippi Canal Company, and whom I knew to be such assistant secretary *pro tempore*, who, being by me duly sworn, did then and there depose and say that he is the assistant secretary *pro tempore* of the Green Bay and Mississippi Company; that he attested the within deed of conveyance as such assistant secretary *pro tempore;* that he well knows the common and corporate seal of said company, and that the one to said deed affixed is such common and corporate seal; that he so attested said deed as the act and deed of such company and by order and authority of said company for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my seal this eighteenth day of September, A. D. 1872.

[Comm. Wisconsin Seal for N. Y.]

J. B. NONES,
Commissioner for Wisconsin in and for New York,
No. 91 Duane St., Cor. Broadway.

22 [Endorsed:] In circuit court, Outagamie county, Wisconsin. The Green Bay and Mississippi Canal Company, plaintiff, against Kaukauna Water Power Company, Bradner, Smith & Company, James C. Delaney, Charles D. Cased, David McCartney, James H. Elmore, Joseph Klein, Milwaukee, Lake Shore & Western Railway Company, and Badger Paper Company, defendants. Answer. Alfred L. Cary, attorney for said defendants, Kaukauna Water Power Company, Bradner, Smith & Company, Milwaukee, Lake Shore & Western Railway Company, and Badger Paper Company. David S. Ordway, of counsel. Filed Feb. 20, 1886. F. C. Friedrichs, clerk. Filed July 22, '87. Clarence Kellogg, clerk sup. c't Wis.

*"Henry C. Blake" written by the register in pencil.

23 In Circuit Court, Outagamie County.

GREEN BAY AND MISSISSIPPI CANAL COMPANY, Plaintiff,

vs.

KAUKAUNA WATER POWER COMPANY *et al.*, Defendants.

On reading the summons and complaint herein and the annexed affidavit of Moses Hooper, on motion of Moses Hooper, plaintiff's attorney—

Ordered, That the summons and complaint herein be amended by addition of name "B. Aymer Sands," as trustee, as defendant therein; that such amendment be made by the clerk's adding such name as defendant in the original summons and complaint on file in red ink and referring in margin to this order.

March 11, 1886.

By the court:

GEO. H. MYERS, *Judge.*

24 [Endorsed:] Out. Co. circuit. G. B. & M. Canal Co. *vs.* K. W. P. Co. *et al.* Order making Sands, trustee, defendant. Filed Mar. 11, 1886. F. C. Friedrichs, clerk. Filed Jul. 22, '87. Clarence Kellogg, clerk sup. c't Wis. Moses Hooper, plaintiff's attorney.

25 Outagamie County Circuit Court.

GREEN BAY AND MISSISSIPPI CANAL COMPANY, Plaintiff,

vs.

KAUKAUNA WATER POWER COMPANY *et al.*, Defendants.

STATE OF WISCONSIN, } *ss:*
Outagamie County, }

Moses Hooper, being duly sworn, on his oath deposes and says that he is sole attorney for plaintiff in foregoing-entitled action; that the summons and complaint therein was served more than twenty days ago on all of the defendants except Charles D. Cased; that said Cased has, as he is informed and believes, disposed of all his interest in the property in dispute and is no longer a party interested therein in any way, which is the reason why service has not been made upon him.

That one B. Aymer Sands is a proper party to said action; that he is trustee named in a trust deed made upon the property in dispute by the principal defendant, The Kaukauna Water Power Company, to secure the payment of certain mortgage bonds issued by said Kaukauna Water Power Company.

That all of the defendants herein who have appeared have appeared and answered by A. L. Cary, of Milwaukee, as their attorney; that said Cary has consented by telegraph that said Sands be made party defendant herein by amendment of summons and

complaint, *by telegraph*, in these words: "I will consent that
26 you make Sands a party, but must get his authority before I appear. (S'g.) A. L. Cary."

MOSES HOOPER.

Subscribed and sworn to before me this 11th day of March, 1886.

H. G. FREEMAN,
Notary Public.

[Endorsed:] Filed Mar. 11, 1886. F. C. Friedrichs, clerk. Filed Jul. 22, '87. Clarence Kellogg, clerk sup. c't Wis.

27 In the Circuit Court, Outagamie County.

GREEN BAY AND MISSISSIPPI CANAL COMPANY, Plaintiff,
vs.
KAUKAUNA WATER POWER COMPANY *et al.* and B. AYMER SANDS, as Trustee, Defendants.

STATE OF WISCONSIN. } ss:
Outagamie County, }

Moses Hooper, being duly sworn, says that he is sole attorney for the plaintiff above named, and makes this affidavit on its behalf; that the above-entitled action has been commenced and is now pending; that a summons has been issued therein which is now on file in said court; that the plaintiff's complaint herein is duly verified and has been filed with the clerk of the circuit court of Outagamie county; that a cause of action exists in favor of the said plaintiff and against the above-named defendants, the grounds of which are as stated in said verified complaint; that B. Aymer Sands is named as trustee in a certain trust deed made by the Kaukauna Water Power Company, principal defendant, to secure payment of certain mortgage bonds of said water power company; that the relief sought consists wholly (so far as relates to said Sands) in excluding him as such trustee from any interest in certain hydraulic power specified in complaint by — in Outagamie county, Wisconsin; that
28 said trust deed included said water power and purports to subject same to payment of said bonds; that said plaintiff is unable, with due diligence, to make service of the summons in said action upon the said defendant Sands; that the said defendant Sands cannot be found within the State of Wisconsin, although diligent effort to find him and serve upon him the said summons has been made; that said mortgage bonds are made payable at the office of Samuel S. Sands & Co., New York city; that the said defendants post-office address is New York city, as nearly as defendant can ascertain, but the street and number deponent cannot ascertain, and said defendant's residence is in the city of New York, as deponent is informed by A. L. Cary, attorney for principal defendant, who resides at Milwaukee, Wisconsin.

MOSES HOOPER.

Subscribed and sworn to before me this 11th day of March, A. D. 1886.

H. G. FREEMAN,
Notary Public, Out. Co., Wis.

[Endorsed:] Circuit court, Outagamie county. Green Bay & Miss. Canal Co. *vs.* Kaukauna Water Power Co. *et al.* Affidavit for publication and order. Filed Mar. 11, 1886. F. C. Friedrichs, clerk. Filed Jul. 22, '87. Clarence Kellogg, clerk sup. c't Wis.

29 Circuit Court, Outagamie County.

GREEN BAY & MISSISSIPPI CANAL COMPANY, Plaintiff,
against
KAUKAUNA WATER POWER COMPANY *et al.* and B. AYMER SANDS, as Trustee, Defendants.

Upon the complaint herein, duly verified and filed, and upon the affidavit of Moses Hooper, sole attorney *sole attorney* for the plaintiff, also hereto attached, ordered, on motion of Moses Hooper, attorney for the plaintiff, that the service of the summons herein *herein* be made upon the defendant, B. Aymer Sands, as trustee, by its publication in the Appleton Post, a weekly newspaper printed and published in Appleton, Outagamie county, Wisconsin, which paper is hereby designated as most likely to give notice to the defendant, to be served once in each week for six successive weeks, and that on or before the day of the first publication thereof the plaintiff deposit in the post office, in the city of Appleton, in said county, a copy of the summons, together with a copy of the complaint, securely inclosed in an envelope, with the postage thereon duly paid, addressed to the defendant, B. Aymer —, in care of Samuel S. Sands & Co., at his post office in New York city, New York, or in lieu thereof that such service be made by personal service of said summons and complaint upon said B. Aymer Sands out of the State of Wisconsin.

New York city, New York, March 11, 1886.

By the court:

GEO. H. MEYERS, *Judge.*

30 [Endorsed:] Out. Co. cir. court. G. B. & M. Canal Co. *vs.* Kaukauna Water Power Co. Order pub. summons on B. Aymas Sands. Filed Mar. 11, 1886. F. C. Friedrichs, clerk. Filed Jul. 22, '87. Clarence Kellogg, clerk sup. c't Wis. Moses Hooper, plaintiff's attorney.

31 In Circuit Court, Outagamie County.

GREEN BAY & MISSISSIPPI CANAL COMPANY
against
THE KAUKAUNA WATER POWER COMPANY *et al.*

Findings of Fact.

Plaintiffs proposed findings of fact rejected by the circuit judge—

That the dam involved in this case reaches from lot five (5), section twenty-two (22), south of the river, to section twenty-four (24), north of the river, at the head of Kaukauna rapids.

That same, with canal and locks leading from same on the north side of the river, are part of the line of improvement known as the Fox and Wisconsin improvement; that the land grant specified in the act of Congress approved August 8th, 1846, and accepted by the State of Wisconsin, was made to secure such improvement.

2.

That the said dam was located by the State of Wisconsin by its board of public works about the year 1849, and the building of the same was contracted for by Morgan L. Martin pursuant to chapter 179 of the Laws of 1851, and was partially built by Martin, and was completed by the Fox and Wisconsin Improvement Company in the years 1853–'4–'5, and has ever since been continuously maintained and kept in repair by said company and its successors in title, the plaintiff and the United States, until the year 1876, when a substitute for the same was built as hereinafter specified.

3.

32 That on the 6th day of July, 1853, the State of Wisconsin, having found itself unable to fully complete said works of improvement, and having become largely indebted for money expended upon the same, including said dam and locks hereinbefore mentioned, and being involved in numerous unfulfilled contracts, including the contract for building this dam, payments on which it could not make from funds derived from said land grants or any other funds or property applicable thereto, the said State incorporated the Fox & Wisconsin Improvement Company for the purpose of completing such improvement and relieving the State of its indebtedness on account of the work theretofore done on the same and from liability on contracts not then secured. For such purposes the State of Wisconsin granted to the Fox and Wisconsin Improvement Company the works of improvement heretofore mentioned, together with all and singular the rights of way, dam, locks, canals, water power, and other appurtenances of said works as fully as the State then held the same, including this dam and water power, as fully as such State could grant the same, and imposed on said company the duty of completing such improvement.

4.

That pursuant to said chapter 98 of the Laws of 1853 said Fox & Wisconsin Improvement Company, in 1855, completed the building of said dam located as hereinbefore stated, and proceeding
33 to the completion of the works of improvement as then contemplated and as enlarged by chapter 98 of the Laws of 1853 and chapter 11 of the Laws of 1856, and to that end expended a large amount of money upon such works, and on account of the so-called State indebtedness of the State of Wisconsin, several hundred thousand dollars.

5.

That said dam furnished from the mill pond sustained by the same a large and very valuable hydraulic power, which is one of the powers mentioned in the act of the State of Wisconsin approved August 8, 1848; also mentioned in section 2 of the act of the State of Wisconsin — July 6th, 1853.

6.

That the said Fox & Wisconsin Improvement Company bought lands adjacent to the said canal for the purpose of rendering the hydraulic power furnished by said dam available, which lands so bought were sufficient to enable said company and its grantees to make use of all the power furnished by said dam.

7.

That thereafter the State of Wisconsin, by an act approved October 3d, 1856, required the said Fox and Wisconsin Improvement Company to make a deed of trust as therein provided; that said Fox and Wisconsin Improvement Company accepted and ratified the same and made its deed pursuant thereto on the first day of December, 1856. Such deed provided for the issuing of the bonds
34 of said company to the amount of one million five hundred thousand dollars ($1,500,000), the proceeds of which should be expended for the purposes specified in said act of October 3d, 1856.

8.

That in September, 1863, the said Fox & Wisconsin Improvement Company had proceeded to the enlargement of said canal, according to the plan adopted by chapter 289 of the Laws of 1861, and sold and issued nearly all of its bonds secured by said deed, and the interest had become due and payable upon the same and had not been paid, and the indebtedness of the State so secured by said trust deed had not all been paid; that thereupon the trustees of the estate granted by said trust deed proceeded to foreclose the same and cause such property to be sold; that on such sale this plaintiff became seized in fee of all the works of improvement known as the Fox & Wisconsin improvement, together with all and singular the rights of way, dams, locks, canals, and other appurtenances, together with the lands and water powers of said Fox & Wisconsin Improvement

Company, including said dam in town. 21, range 18, and all its title to the water power furnished thereby and all mill lots connected therewith; that the consideration of the sale to the plaintiff was the sum of $191,000, which sum was applied to the payment of the State indebtedness incurred on account of such improvement, and the sum of $43,971.15, adjudged by the court, on such foreclosure,
35 necessary to complete the improvement of said Fox and Wisconsin rivers, according to chapter 209 of the Laws of 1861.

9.

That upon such sale this plaintiff, pursuant to chapter 289 of the Laws of 1861, accepted and went into possession of the rights, powers, privileges, franchises, capacities, immunities, exemptions, and burdens granted by, conferred under, or imposed by said acts and acts amendatory thereto, and received the rights, franchises, and property theretofore granted by the State of Wisconsin to the said Fox and Wisconsin Improvement Company, including said dam, canal, and all its right and title to said water power connected therewith.

10.

That this plaintiff continued to keep in repair said dam and maintain the same and the said works of the Fox and Wisconsin Improvement Company until the same was transfer-ed to [by] this plaintiff to the United States, pursuant to an act of Congress approved July 7th, 1870, and acts of the State of Wisconsin approved March 23d, 1871.

11.

That pursuant to such act of Congress a board of arbitrators selected and determined the actual value of the property and rights of property of this plaintiff to said line of water communication to be one million forty-eight thousand and seventy dollars ($1,048,070), and that the amount of money realized from the sale of the
36 lands, and to be deducted therefrom, amounted to seven hundred and twenty-three thousand and seventy ($723,070), leaving a balance of three hundred and twenty-five thousand dollars ($325,000) to be paid to this plaintiff for all such property, unless in the opinion of the Secretary of War some of the same might not be needed for public use. Such board also appraised the value of the water powers and lots necessary to the enjoyment of the same, subject to the right to use the water for the purposes of navigation, at one hundred and forty thousand dollars ($140,000), which valuation and appraisal included the water power funished by said dam in town. 21, range 18; and said board valued the personal property of the plaintiff at forty thousand dollars ($40,000).

12.

That the Secretary of War reported to Congress that in his opinion the water powers and lots necessary to the enjoyment of the same, subject to all the rights to use the water for the purposes of

navigation, and the personal property of said company were not needed by the United States; that thereupon Congress made an appropriation, by an act approved January 10th, 1872, for the purchase of all the property of this plaintiff, except said water power, lots, and personal property, for the sum of one hundred and forty-five thousand dollars ($145,000), which sum was paid to this plaintiff on or about the 18th day of September, 1872; whereupon this plaintiff conveyed to the United States certain of its franchises and property, as appears by this deed, a copy of which is made a part of this answer of the defendants herein.

37

13.

That lot No. (5) five, where it abuts on the Fox river, and lots No. six (6) and seven (7), im-ediately above the same, on the Fox river and south of said river, in their natural condition were low and scarcely raised above the surface of the water in said river at its natural stage, and in order to maintain a useful stage or head of water in said pond for the purpose of navigation and hydraulic power it was necessary to build and is necessary to keep and maintain along and on said lots where they abut on the river above said dam, and as a continuation and part of said dam, an embankment of the height of about ten feet and of a thickness and strength sufficient to hold the water of said pond at about the deph of ten feet.

14.

That in the year 1854 one John Hunt, then the owner in fee simple of lots No-. six (6) and seven (7), made a grant to the Fox and Wisconsin Improvement Company and to its successors and assigns of the right to erect and forever maintain over and on said lots six (6) and seven (7) an embankment of sufficient height and width to hold the water in said mill pond, and also to excavate a ditch or drain on the land side of such embankment, which deed was recorded while said Hunt was the owner in fee of said lots; that under and by virtue of such grant the Fox and Wisconsin Improvement Company did build such embankment and dig such ditch in the year 1854, and that the same has been maintained and repaired from that time until the present time by the Fox and Wisconsin Improvement Company and this plaintiff as its grantees, and the United States as the grantee of this plaintiff, until the same was cut and broken by the defendant.

38

15.

That in building and maintaining said dam and embankment on the south side of said river the Fox and Wisconsin Improvement Company expended a large amount of money; that the plaintiff, as its grantee, also expended a large amount of money in maintaining and keeping the same in repair, and that the Government of the United States has expended a large amount of money also in keeping the same in repair.

16.

That the canal of the Kaukauna Water Power Company hereinafter mentioned was commenced under the authority of and title of the Kaukauna Improvement Company; that immediately on the commencement of said canal this plaintiff gave notice in writing to the Kaukauna Improvement Company, under whose authority and title the Kaukauna Water Power Company claims the right of maintaining said canal, of the plaintiff's claim to the hydraulic power furnished by said dam, and to the said dam and appurtenant embankment, and that this plaintiff would resist the breaking and the drawing of water from said mill pond by said Kaukauna
39 Improvement Company, which company claimed the right to break said banks and to draw said water from said mill pond.

17.

That the defendant, the Kaukauna Water Power Company, owns that part of lots five (5), six (6), and seven (7), in section twenty-two (22), south of the Fox river, which border on said Fox river, subject only to such rights as this plaintiff and the United States have acquired therein through the legislation of the State, and the building and maintenance of said dam and said embankment, and through the said deed made by Hunt.

18.

That the Kaukauna Water Power Company, claiming title through and under said Kaukauna Improvement Company, has broken the bank maintaining said mill pond, upon lot six (6), and has drawn and is drawing for the use of its tenants water from said mill pond through the breach in said embankment, and claims the right to — through the same one-half of the flow of the Fox river, subject only to the rights of navigation, and pass the same around the south end of said dam and return the same to the Fox river below said dam; that in building and opening said breach the Kaukauna Water Power — has broken, torn away, and removed the embankment and drain built and dug and maintained as aforesaid by this plaintiff and its grantors upon, along, and on said lot six (6) for the space of about two hundred feet.

19.

40 That the defendants, other than the Kaukauna Water Power Company, are tenants of said water power company, and claim the right to use the water from the said canal of the Kaukauna Water Power Company under its authority.

20.

The United States, having taken title to the improvement, built a new dam below the old one, about forty-five (45) feet on the south side of the river and about eighty (80) feet on the north side of the river. This new dam is about the same height and flowage as the old one, and has been continually maintained by the United States since 1876.

21.

That the flowage of this dam and of the old dam built by the Fox and Wisconsin Improvement Company extended up Fox river for about two miles; that the right of flowage of the said dam has been secured and damages caused by the same have been paid by the Fox and Wisconsin Improvement Company and the Green Bay and Mississippi Canal Company.

22.

That in 1859 the engineers in charge of the Fox and Wisconsin Improvement Company surveyed and made maps of the lands claimed by the company in connection with the dams and ponds raised and maintained by the company and ran a blue line on the maps showing the outer boundaries of the lands claimed by the company for the use of the improvement. These maps have
41 dots by which the blue line can be located, but no evidence was given as to the erection of any landmarks on the ground that then marked the boundaries to which the company claimed. These maps are kept in the office of the company. At the dam in question the blue line extends from the west line of lot seven (7) to about four hundred feet below the dam landing, on the south side. The line runs about two rods from the river bank until it gets to within three or four hundred feet of the dam; it then turns to the south until where it arrives just south of the dam landing it is nearly two hundred feet from the shore line. It then turns to the north, and strikes the river about four hundred feet below the dam.

23.

For upwards of thirty years last past the State and the companies that have owned the improvement and the United States have used the south bank of the Fox river without question for landing materials for building and repairing the dams and for other purposes connected therewith. These repairs have been made as required, and much of the time yearly, at least.

24.

That the entire land grants made by the United States for said improvement and all the revenue derived from the same and the water powers created by the dams forming said improvement have not been sufficient to build and maintain the improvement according to the specifications provided by statute.

42 [Endorsed:] Circuit court, Outagamie county. Green Bay & Mississippi Canal Company, plaintiff, *vs.* Kaukauna Water Power Company *et al.*, defendants. Findings proposed by plaintiff. Refused. Geo. H. Myers, judge. Filed Mar. 10, 1887. F. C. Friedrichs, clerk. Filed Jul- 22, 1887. Clarence Kellogg, clerk sup. c't Wis.

43 Circuit Court, Outagamie County.

GREEN BAY & MISSISSIPPI CANAL COMPANY, Plaintiff,

vs.

KAUKAUNA WATER POWER COMPANY *et al.*, Defendants.

Defendants' Proposed Findings of Fact Rejected by the Circuit Judge.

This action being at issue, and having on the 14th day of July, 1886, in pursuance of a stipulation between the parties, come on to be tried by the court, and the testimony being all in, and the case having been argued by counsel for the respective parties, and being now fully considered, I find the following facts aside from those which are undisputed:

1st. That none of the lands granted by Congress to aid in the improvement of the Fox & Wisconsin rivers were situated or located in either of lots five (5), six (6), or seven (7), in section twenty-two (22), south of the Fox river, in township twenty-one (21) north, of range eighteen (18) east, or in section twenty-four (24), on the north side of said river, in said township and range, and that none of said granted lands bordered upon or touched said Fox river in township twenty-one (21), range eighteen (18) east, and that the State of Wisconsin did not on the 8th day of August, 1848, or at any time after that, own or have title to any land on the south side of said Fox river lying or being in said lots five (5), six (6), or seveven (7), in said section twenty-two (22), and that the State of Wisconsin did not on the 8th day of August, 1848, or there-
44 after, have title to or own any land on the north side of said Fox river lying or being in said section twenty-four (24).

2nd. That the State of Wisconsin did not by an act entitled "An act to provide for the improvement of the Fox and Wisconsin rivers and connecting the same by a canal," approved August 8th, 1848, appropriate to its own use, or to the use of its successors or assigns, all the water power of said Fox river which should thereafter be made available by a dam erected in the business of improveing said river, and that appropriation was not necessary to secure the improvement of said Fox and Wisconsin rivers, or to prevent the application of the proceeds of the public lands granted, as stated in said complaint, from being expended upon dams which should furnish hydraulic powers to private parties, owners of the lands bordering on the banks of said Fox river.

3rd. That by the grant or transfer made by the State of Wisconsin to the Fox & Wisconsin Improvement Company, mentioned in said complaint, only so much of the hydraulic power created by the dam built upon said Fox river in township twenty-one (21), range eighteen (18) east, passed to said Fox and Wisconsin Improvement Company as was owned by the State, and that none of the hydraulic or water powers upon or appurtenant to the south or southerly shore or bank of said river and furnished by said dam ever

45 passed to or were owned by said Fox and Wisconsin Improvement Company.

4th. That the allegations of said complaint quoted at folios 14 to 16, inclusive, of the answer herein are not true.

5th. That on the foreclosure sale set out in said complaint at folios 31, 32, 33, and 34 neither the said committee nor said plaintiff, by virtue of said foreclosure or of said sale or in any way or manner, took or obtained title of any kind to any strips or parcels of land adjacent to said improvement on the south side of said Fox river in said lots five (5), six (6), or seven (7) other than or aside from the easement released by John Hunt to the said Fox & Wisconsin Improvement Company and referred to in said complaint, at folio 55 thereof, and that neither said committee nor said plaintiff, by or through such foreclosure or sale or otherwise, ever took or obtained title to all of the water power created by or upon the line of or connected with the work of said improvement company.

6th. That said plaintiff never, by an agent, servant, lessee, officer, or other person, at any time, entered into possession of or used any of the water power furnished by said dam on the south or southerly side of said Fox river, and that none of the water power furnished by said dam was ever used upon said lots five (5), six (6), and seven (7) or upon either one of them until the same was so appropriated and used by the defendant, Kaukauna Water Power Company, and that said plaintiff has never used but a small portion of one-

46 half of the water power created or raised by said dam for any purpose.

7th. That by a deed dated September 18th, 1872, the plaintiff conveyed to the United States of America certain of its franchises and property therein mentioned, a copy of which said deed is annexed to the answer herein and marked "Exhibit No. 1."

8th. That said plaintiff is not and was not at the time of the commencement of this action or at any other time the owner of or entitled to the exclusive use or control of all the water power or hydraulic power created by said dam, and that the plaintiff has never had title to or possession of said canal, dam, or embankments for the purpose of using all the surplus water drawn or to be drawn from said pond over and above the amount necessary for use in navigation.

9th. That said plaintiff does not and never did own or have any interest in as lessee or otherwise any lands or lots, vacant or otherwise, lying on the south or southerly bank, shore, or side of said Fox river, and being part or parcel of said lots five (5), six (6), or seven (7), or upon which it could use on the south side of said river any of said water raised by said dam except the interest that it acquired under the John Hunt release mentioned in said complaint and hereinafter referred to, and also except the right to abut said dam upon the south bank of said Fox river.

47 10th. That the United States, being the owner of said lot five (5), sold the same, September 1st, 1835, to one Garrett V. Denniston and gave him a certificate of entry therefor, which he assigned to Joshua Hatheway, Jr., who received a patent from the

United States for said lot; which patent is in the words and figures following, to wit:

"United States of America to Joshua Hatheway, Jr.

Certificate No. 334.

To all whom these presents shall come, Greeting:

Whereas Joshua Hatheway, Jr., assignee of Garrett V. Denniston, has deposited in the General Land Office of the United States a certificate of the register of the land office at Green Bay, whereby it appears that full payment has been made by said Garrett V. Denniston, according to the provisions of the act of Congress of April, 1820, entitled 'An act to make further provisions for the sale of public lands,' for the lot No. 5, fractional section 22, township 21 north, of range 18 east, in the district of lands subject to sale at Green Bay, Michigan Territory, containing 81 acres and $\frac{54}{100}$ acres according to the official certificate of said land returns to the General Land Office by the surveyor general, which said certificate has been purchased of said Garrett V. Denniston: Now, know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto said Joshua Hatheway, Jr., and to his heirs said premises above described:

48 To have and to hold the same, together with all the rights and privileges, immunities and appurtenances, of whatever nature, thereunto belonging, to said Joshua Hatheway, Jr., to his heirs and assigns, forever.

In testimony whereof I, Martin Van Buren, President of the United States of America, have caused these letters to be made public and the seal of the General Land Office to be hereunto affixed.

Given under my hand, in the city of Washington, this 10th day of August, 1837, and of the Independence of the United States 62.

By the President:

MARTIN VAN BUREN,
By A. VAN BUREN, *Secretary.*
J. F. WILSON,
Recorder General Land Office."

That by warranty deed bearing date April 20th, 1836, said Joshua Hatheway, Jr., conveyed said lot to Samuel Beardsley, who held the title thereto until his death, May 7th, 1860. His heirs conveyed said lot to Stephen Frisbey October 16th, 1871, who conveyed his title to said lot through several mean [mesne] conveyances to the defendant, Kaukauna Water Power Company, said company acquiring its title on the 14th day of May, 1880.

11th. That the United States of America, being the owner of said lots six (6) and seven (7), sold the same, Sept. 1st, 1835, to one Garrett V. Denniston, and immediately thereafter patented the same to said

Denniston, and that said title to said lots afterwards passed by mean [mesne] conveyances from said Denniston to one John Hunt prior to the sixth day of October, 1854, who held the title to said lots in
49 fee until on and after the 6th day of October, 1854, and that by several mean [mesne] conveyances from said Hunt the said title to said lots became and is now vested in fee in the defendant, Kaukauna Water Power Company.

12th. That the original dam across the Fox river at the place in question was constructed by the Fox and Wisconsin Improvement Company, which company commenced the construction of said dam in the year 1854 and completed the same and securely attached the south end thereof to the south bank of the river, on said lot five (5), in the year 1855 and a-so constructed and embankment leading from the south end of said dam, upstream, along the shore of said river on said lots five (5), six (6), and seven (7), in the year 1855, which embankment was about eight feet high at the dam, and that said dam and embankment were constantly maintained by the Fox and Wisconsin Improvement Company and its successor, the Green Bay and Mississippi Canal Company, until they were taken possession of by the United States of America under its purchase from said Green Bay & Mississippi Canal Company in the year 1872, and that said United States maintained said dam and embankment until it constructed a new dam across said river below said old dam, the south end of which said new dam abutted upon said lot five (5) at a point forty feet below said old dam, and the north end
50 of said new dam abutted upon the north shore of said river at a point about seventy feet below said old dam. Said new dam was completed by the United States in the year 1876, and has been constantly maintained by it ever since, and is about*h* the same height*h* as said old dam, and causes the water of said river to set back to about the same extent as did said old dam; that the southerly half of said new dam and the point of abuttal of the south end thereof is upon land in said lot five (5), which prior to and at the time of the commencement of this action belonged to and was in the possession of the defendant, Kaukauna Water Power Company, its title being in fee and derived from and through the said Samuel Beardsley, as hereinbefore found; that after the building of said new dam the United States constructed and extended the said embankment along the southerly shore of said Fox river on said lot (5), from the said old dam down-stream to and joined and terminated the same upon its said new dam, as the same is now in use; that neither the United States nor any other party have by purchase, condemnation, dedication, or in any other way acquired of or from the owner of said lot five (5) the right to so construct and abut said new dam upon said lot five (5) or to extend or maintain said new part of said embankment thereupon.

13th. That no condemnation proceedings were ever instituted or had by the State of Wisconsin, the Fox and Wisconsin Improvement Company, the plaintiff, or the United States to acquire any
51 right, title, or interest in or to either of said lots five (5), six (6), or seven (7), or any part thereof.

14th. That no conveyance was ever made by said Denniston, Beardsley, or any other owner of said lots five (5), six (6), or seven (7), except John Hunt, to the State of Wisconsin or to the Fox & Wisconsin Improvement Company or to the plaintiff or to the United States of any right, title, or interest in or to either of said lots five (5), six (6), or seven (7) or any part thereof.

15th. That said Beardsley never waived condemnation or appr-isal of damages for his said lot five (5) or his riparian rights appurtenant thereto.

16th. That on the 6th day of October, 1854, said John Hunt, being then the owner of said lots six (6) and seven (7), executed and delivered to the Fox and Wisconsin Improvement Company the instrument set forth in defendant's answer herein, at folios 26 and 27, which is the only conveyance ever given to said Fox and Wisconsin Improvement Company by said Hunt of any interest in said lots six (6) and seven (7) or either one of them.

17th. That said plaintiff executed and delivered to the United States of America an indenture, dated September 18th, 1872, a copy of which is annexed to defendant's answer herein as "Exhibit No. 1."

18th. That no dam was ever constructed across said Fox river at the point in question prior to the one that was constructed by the Fox and Wisconsin Improvement Company, as above found.

52 19th. That during and since the year 1854 the Fox and Wisconsin Improvement Company, the plaintiff, and the United States have occasionally and yearly, at least, used the south bank of the Fox river at and in the vicinity of said dams and embankments without question for landing and hauling materials for building and repairing said dams and embankments and for all purposes connected therewith, but for no other purpose, and that they nor neither of them have ever used the south bank of said Fox river on said lots five (5), six (6), and seven (7) or either of them, except as hereinbefore found and stated, and that neither the Kaukauna Water Power Company nor any of its said grantors have had any notice or knowledge of any claim of ownership on the part of the State of Wisconsin or said plaintiff or said Fox and Wisconsin Improvement Company or the United States of, in, or to the one-half of the water power of said Fox river appurtenant to the south shore of said river until the time of the service of the notice set forth in said complaint in folio 63.

20th. That the defendant, Kaukauna Water Power Company, has constructed a canal for hydraulic purposes about two thousand five hundred feet long, and extending from a point on said river on the south shore thereof, above said dam, down-stream, upon lands owned by said defendant, Kaukauna Water Power Company; that

53 the mouth of said canal, at said river, is principally upon the said lot six (6), with a small part thereof on said lot five (5); that in constructing said canal said water power company cut through said embankment to the river on said lots five (5) and six (6), and that in the construction of said canal it put therein, at a point near the mouth thereof, where it opens into said river, sub-

stantial bulkheads and head-gates of sufficient height*h*, depth, and strength to retain the water of said river within its banks as effectually and to the same height*h* and extent as it was retained by the embankments constructed by said plaintiff and its grantors and grantees; that the head-water in said canal for hydraulic purposes just below said head-gates is about fourteen feet, and that said head increases from that point to the easterly or down-stream end of said canal, where it is about twenty-four feet; that the construction of said canal and bulkheads by said defendant, Kaukauna Water Power Company, cost somewhere from $150,000.00 to $200,000.00, and that said Kaukauna Water Power Company has never drawn through said canal to exceed one-half of the water of said river at this point, exclusive of that required for the purposes of navigation.

Legal Conclusions.

I find as conclusion of law upon the facts that the plaintiff is not entitled to any relief herein, and judgment is therefore ordered dismissing the plaintiff's complaint upon the merits, with costs.

54 [Endorsed:] In circuit court, Outagamie county. Green Bay & Mississippi Canal Company *vs.* Kaukauna Water Power Company *et al.*, defendants. Findings of facts & conclusions of law; refused by court, G. H. Myers. Filed Mar. 10, 1887. F. C. Friedriehs, clerk. Filed Jul. 22, 1887. Clarence Kellogg, clerk sup. c't Wis.

55 STATE OF WISCONSIN:

In Circuit Court, Outagamie County.

GREEN BAY & MISSISSIPPI CANAL COMPANY, Plaintiff,
against
KAUKAUNA WATER POWER COMPANY *et al.*, Defendants.

Exceptions of Plaintiff to the Findings of Fact and to the Failure to Find Facts.

Plaintiff excepts to the failure of the court to find the fact numbered 4 in the findings proposed by the plaintiff, for the reason that the proofs show the facts to be as stated in the 4th proposed finding.

"2."

Plaintiff excepts to the failure of the court to find the fact numbered 5 in the findings proposed by the plaintiff, for the reason that the proofs show the facts to be as stated in said 5th proposed finding.

"3."

Plaintiff excepts to the failure of the court to find the fact numbered 8 in the findings proposed by the plaintiff, for the reason that

the proofs show the facts to be as stated in said 8th proposed finding.

4.

Plaintiff excepts to the failure of the court to find the fact numbered 9 in the findings proposed by the plaintiff, for the reason that the proofs show the facts to be as stated in said 9th proposed finding.

56 "5."

Plaintiff excepts to the failure of the court to find the fact numbered 10 in the findings proposed by the plaintiff, for the reason that the proofs show the facts to be as stated in said 10th proposed finding.

"6."

Plaintiff excepts to the failure of the court to find the fact numbered 11 in the findings proposed by the plaintiff, for the reason that the proofs show the facts to be as stated in said 11th proposed finding.

"7."

Plaintiff excepts to the failure of the court to find the fact numbered 12 in the findings proposed by the plaintiff, for the reason that the proofs show the facts to be as stated in said 12th proposed finding.

8.

Plaintiff excepts to the failure of the court to find the fact numbered 13 in the findings pro*pro*posed by the plaintiff, for the reason that the proofs show the facts to be as stated in said 13th proposed finding.

"9."

Plaintiff excepts to the failure of the court to find the fact numbered 14 in the findings proposed by the plaintiff, for the reason that the proofs show the facts to be as stated in said 14th proposed finding.

"10."

57 Plaintiff excepts to the failure of the court to find the fact numbered 15 in the findings proposed by the plaintiff, for the reason that the proofs show the facts to be as stated in the said 10th [15th] proposed finding.

"11."

Plaintiff excepts to the failure of the court to find the fact numbered 16 in the findings proposed by the plaintiff, for the reason that the proofs show the facts to be as stated in said 16th proposed finding.

"12."

Plaintiff excepts to the failure of the court to find the fact numbered 17 in the findings proposed by the plaintiff, for the reason

that the proofs show the facts to be as stated in said 17th proposed finding.

13.

Plaintiff excepts to the failure of the court to find the fact numbered 18 in the findings proposed by the plaintiff, for the reason that the proofs show the facts to be as stated in said 18th proposed finding.

14.

Plaintiff excepts to the failure to find the fact numbered 19 in the findings proposed by the plaintiff, for the reason that the proofs show the facts to be as stated in said 19th proposed finding.

"15."

Plaintiff excepts to the failure of the court to find the fact numbered 20 in the findings proposed by the plaintiff, for the rea-
58 son that the proofs show the facts to be as stated in said 20th proposed finding.

"16."

Plaintiff excepts to the failure of the court to find the fact numbered 21 in the findings proposed by the plaintiff, for the reason that the proofs show the facts to be as stated in said 21st proposed finding.

"17."

Plaintiff excepts to the failure of the court to find the fact numbered 22 in the findings proposed by the plaintiff, for the reason that the proofs show the facts to be as stated in said 22nd proposed findings.

"18."

Plaintiff excepts to the failure of the court to find the fact numbered 23 in the findings proposed by the plaintiff, for the reason that the proofs show the facts to be as stated in said 23d proposed finding.

"19."

Plaintiff excepts to the failure of the court to find the fact numbered 24 in the findings proposed by the plaintiff, for the reason that the proofs show the facts to be as stated in said 24th proposed finding.

"20."

Plaintiff excepts to that part of the findings of fact which finds that "The United States owns the dam landing on the north shore," because the same is not the fact, but is contrary to the proofs.

"21."

59 Plaintiff excepts to that part of the findings of fact contained in the following words: "This provision was drawn with carelessness and disregard to the rights of property-owners," because such is not the fact and is contrary to the proofs.

22.

Plaintiff excepts to that part of the findings of fact contained in the following words: "But no evidence is given as to the erection of any landmarks on the ground that then marked the boundary *to* which the company claimed," because such is not the fact and is contrary to the proofs.

"23."

Plaintiff excepts to that part of the findings of fact contained in the following words: "There is no proof that land-owners on the river, or the general public, knew anything about these maps, or that the company made any claim to the land marked on those maps not actually occupied by the company to the exclusion of the riparian owners on the river," because such is not the fact and is contrary to the proofs.

24.

Plaintiff excepts to that part of the findings of fact contained in the following words: "The plaintiff has never used but a small portion of one-half of the water power created and raised by the dam in question for any purpose," because such is not the fact and is contrary to the proofs.

MOSES HOOPER,
Plaintiff's Attorney.

60 [Endorsed:] Circuit court, Outagamie county. Green Bay & Mississippi Canal Company *vs.* Kaukauna Water Power Company. Exceptions of pl'ff to facts found and failure to find facts. Filed May 22, 1887. F. C. Friedrichs, clerk. Filed Jul. 22, '87. Clarence Kellogg, clerk sup. c't Wis.

61 Circuit Court, Outagamie County.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY, Plaintiff,

vs.

THE KAUKAUNA WATER POWER COMPANY *et al.*, Defendants.

This cause having been tried by the court without a jury, the court now finds as follows as to the facts:

The Fox river is one of the navigable waters leading into the St. Lawrence river, and its public use as a commercial highway has been secured by the ordinance of 1887, the constitution of Wisconsin, and many acts of Congress and of the Legislature of Wisconsin. In 1835 the lands on the south side of the river, where the dam in question is located, to wit, lots 5, 6, and 7, south side of Fox river, in section 22, town. 21, range 18, were entered and paid for, and in 1837 patents were issued to the purchasers. The title to these lots have by mesne conveyances come to the defendant, Kaukauna Water Power Company. The landing of the dam in question, upon

the south shore, is upon lot 5. The United States owns the dam landing upon the north shore, but the plaintiff owns land on that shore below the dam landing sufficient to accommodate factories that would be able to use for manufacturing purposes the whole flow of the river not required for navigation. This land of the plaintiff lies along the canal of the United States from
62 which water might be taken.

August 8th, 1846, an act of Congress granting lands to Wisconsin for the improvement of navigation on the Fox and Wisconsin rivers and for the constructing of a canal to unite those rivers was approved by the President. This grant of land was accepted by the State by the act of June 29, 1848, and under an act passed and approved August 8th, 1848, a board of public works was organized to carry on the work of improving the navigation of those rivers. By the 16th section of this act it was provided that when any water power should be created by reason of any dam erected or any other improvement made on any of said rivers such water power shall belong to the State, subject to the future act of the Legislature.

By the 17th section of the act it was provided that where any lands, etc., appropriated by the board of public works should not be freely given to the State, and when the board could not agree with the owners upon the terms, certain proceedings should be had to appr-ise damages and assess benefits on account of the appropriation of such lands, etc. This provision was drawn with carelessness and disregard of the rights of property owners, with which, in early times in this State, charters were granted conferring upon public corporations the right to take the property of citizens for public use.

Under this act the State, by the board of public works,
63 proceeded to the construction of the improvement in question.

In 1853 the State had expended all the proceeds of the sales of the lands granted up to that date and of the water powers leased, if any had then been leased; had incurred a debt which was a lien upon the improvement to the amount of some $250,000, and was involved in contracts that were unfulfilled for work *work* at divers points on the line, including the place in question.

Thereupon, by chapter 98, Laws of 1853, the Legislature incorporated the Fox & Wisconsin Improvement Company and granted to it, to the Fox and Wisconsin Improvement Company, the improvement, with the rights of way, dams, locks, canals, water powers, and all other rights and privileges belonging to the improvement, upon certain conditions, that were complied with by the company.

At the time of the passage of the act the work of the improvement at Kaukauna, including the original dam furnishing the water power in question, was under contract by the State to Morgan L. Martin, pursuant to chapter 179 of the Laws of 1851. In 1853, 1854, and 1855 the dam sustaining the pond in question was built by the State and by the Fox and Wisconsin Improvement Company, the successor and grantee of the State, and securely attached to the south bank of the river on lot 5 aforesaid. This dam was constantly maintained by the Fox and Wisconsin Improvement Company and

64 the Green Bay & Mississippi Canal Company, its grantee and successor, until 1876, when the United States, having taken title to the improvement, built the new dam now in question below the old one 40 feet on the south side of the river.

This dam is about the same height*h* and flowage as the old dam and has been constantly maintained by the United States. This dam causes a flowage up the river for about two miles.

Chapter 112 of the Laws of 1856 provides that the Fox and Wisconsin Improvement Company might make a trust deed of its property to raise money and secure the State for the faithful application of all moneys and property arising from the sale of lands or water powers, and the trust deed was made accordingly.

In 1864 this trust deed was foreclosed. In anticipation of the foreclosure the Legislature, by chapter 289, Laws of 1861, provided for the organization of the Green Bay and Mississippi Canal Company, which was organized, and, as it was authorized to do, did, amongst other things, secure a deed under such foreclosure sale of all the water powers created by and upon the line of or connected with the works of the Fox and Wisconsin river improvement, at whatever points located and wheresoever situated, estimated to be upon the Lower Fox at about 28,780 horse-power, together with any and all strips of land contiguous to and of especial use
65 in connection with such water powers.

In 1859 the engineers of the Fox and Wisconsin Improvement Company surveyed and made maps of the land claimed by the company in connection with the dams and ponds raised and maintained by the company, and ran a blue line on the maps showing the outer boundaries of the lands claimed by the company for the use of the improvement.

These maps have dots by which the blue line can be located on the ground, but no evidence was given as to the erection of any landmarks on the ground that there marked the boundaries *to* which the company claimed.

These maps were kept in the office of the company, and there is no proof that land-owners on the river or the general public knew anything about these maps or that the company made any claim to the land marked on these maps not actually occupied by the company to the exclusion of the riparian owners on the river. At the dam in question the blue line extends from near the west line of lot 7 to about 400 feet below the dam landing on the south side.

The line runs within probably a couple of rods of the river until it gets down within 200 or 400 feet of the dam. It then angles to the south, until when it arrives just south of the dam landing it is nearly 200 feet, I should think, from the river. Then it angles to the north and strikes the river about 400 feet below the dam.
66 For upwards of 30 years past the State, the companies that have owned the improvement, and the United States have used the south bank of the river at this point for landing materials for building and repairing dams, and for all purposes connected therewith. These repairs have been made occasionally as required, and much of the time yearly, at least.

In 1854 John Hunt, who then owned lots 6 and 7, released to the Fox and Wisconsin Improvement Company and their legal representatives for $100 the right to erect and forever maintain an embankment of the dimensions as surveyed by the engineers of the company through lots 6 and 7, with the privilege of excavating a ditch on the south or east side of it not exceeding 3 feet in width, which embankment was built pursuant to acts of Congress and the award of arbitrators. On the 18th day of September, 1872, the Green Bay and Mississippi Canal Company conveyed said improvement to the United States, excepting and reserving therefrom, amongst other things, all of the franchises of said company, namely, the water powers created by the dams and by the use of the surplus water not required for the purpose of navigation, with the right of protection and preservation appurtenant thereto, and the lots, pieces, or parcels of land necessary to the enjoyment of the same and those acquired in reference to the same.

About the first of January, 1881, the Kaukauna Water Power Company commenced to build a canal with intent to cut the
67 banks of the river on lots 5 and 6 and drawing water for hydraulic purposes from the pond raised by the dam in question, and the plaintiff gave that company notice in writing that it would resist the same. The Kaukauna Water Power Company proceeded with its canal, cut the bank of the river on lots 5 and 6 through the embankment named in the deed from Hunt to the Fox and Wisconsin Improvement Company, and through lands included between the blue line marked on the map aforesaid and the river, and now draws water for the purpose of driving machinery through its said canal from the pond raised by said dam.

This canal of the Kaukauna Water Power Company runs through its own lands entirely, subject only to such rights as the United States and the plaintiff have acquired by deed from John Hunt aforesaid and by the statute of limitations or prescription, and to such prescriptions, if any, as are implied by law from the undisputed facts in the case.

There is no proof or pretense that any condemnation proceedings have actually been taken to acquire any rights on the south side of the river at this point by the State, the Fox and Wisconsin Improvement Company, the Green Bay and Mississippi Canal Company, or the United States, or that any conveyance has actually been had by either of them, from any one, of any lands in lots 5, 6, or 7 aforesaid, except the deed from John Hunt.

68 The plaintiff has never used but a small fraction of one-half of the water power created or raised by the dam in question, for any purpose.

In building its canal the Kaukauna Water Power Company has erected and maintains works on the south shore of the river that does the same service that was performed by the embankment mentioned in the deed from John Hunt, to the satisfaction of the United States, so far as has been made known to the court.

As to the law, I find that the defendant is entitled to judgment dismissing the complaint upon the merits, with costs.

Let judgment be entered in accordance with these findings.
March 10, 1887.

GEO. H. MYERS, *Judge.*

[Endorsed:] In circuit court, Outagamie county. Green Bay & Mississippi Canal Company *vs.* Kaukauna Water Power Company *et al.* Judge's findings of fact and conclusions of law. Filed Mar. 10, 1887. F. C. Friedrichs, clerk. Filed Jul. 22, '87. Clarence Kellogg, clerk sup. c't Wis.

69 At a special term of the circuit court in and for the county of Outagamie and State of Wisconsin, begun on the first day of February, A. D. 1887, at the court-house, in Appleton, in said county of Outagamie, and continued until this 10th day of March, A. D. 1887.

Present: Hon. Geo. H. Myers, circuit judge.

GREEN BAY AND MISSISSIPPI CANAL COMPANY, Plaintiff,
against
THE KAUKAUNA WATER POWER COMPANY, BRADNER, SMITH & Company, James C. Delaney, Charles D. Cased, David McCartney, James H. Elmore, Joseph Klein, The Milwaukee, Lake Shore and Western Railway Company, Badger Paper Company, and B. Aymer Sands, as Trustee, Defendants.

This action being at issue upon the answer of said defendants, The Kaukauna Water Power Company, Bradner, Smith & Company, The Milwaukee, Lake Shore and Western Railway Company, and Badger Paper Company, and all of the other defendants being in default for want of answer herein, and this cause having been tried before his honor George H. Myers, circuit judge, upon the testimony taken during the April term of this court, to wit, in June and July, A. D. 1886, and submitted for consideration—

70 And now, at this February term, A. D. 1887, the court being sufficiently advised concerning the same, and having made and on this 10th day of March, 1887, filed his findings of fact and conclusions of law thereupon and ordered judgment herein in favor of said defendants dismissing the complaint upon the merits, with costs—

On motion of Alfred Cary, Esq., attorney for said defendants, it is considered and adjudged by the court now here that the said plaintiff take nothing by its said suit, and that the complaint herein be dismissed upon the merits with costs in favor of said defendants, Kaukauna Water Power Company, Bradner, Smith & Company, The Milwaukee, Lake Shore and Western Railway Company, and Badger Paper Company, taxed at the sum of one hundred and twenty-four dollars and eighty-five cents, and that said last-named defendants have execution therefor.

Copy of judgment.

By the court:

F. C. FRIEDRICHS, *Clerk.*

[Endorsed:] Green Bay & Mississippi Canal Company *vs.* Kaukauna Water Power Company *et al.* Judgment. J. B., vol. 9, p. 347. Filed Mar. 10, 1887. F. C. Friedrichs, clerk. Filed Jul. 22, 1887. Clarence Kellogg, clerk sup. c't Wis.

71 STATE OF WISCONSIN:

Circuit Court, Outagamie County.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY
against
THE KAUKAUNA WATER POWER CO.

Bill of Exceptions.

In July, 1886, the respective parties herein appeared before the court and entered upon the trial of the above-entitled — and produced their proofs upon the issue therein joined, which were as follows:

Plaintiff offered in evidence patent of fractional section No. twenty-four (24), township twenty-four (24) north, range eighteen (18) east, of the fourth principal meridian, recorded in volume nine (9) of Patents, on page fifty-five (55), United States of America to George W. Law.

Thereupon defendant objected to any evidence being received under this complaint, for the reason that it does not state facts sufficient to constitute a cause of action; which objection was overruled, and defendant excepted.

Plaintiff offered in evidence a deed from George W. Law to the Fox and Wisconsin Improvement Company, dated August 28th, 1855, recorded September 3d, 1855, volume six (6) of Deeds, page thirty-six (36), Outagamie County Registry, "of all that certain tract or parcel of land situate in Kaukauna, Outagamie county, and described as follows, to wit: Commencing at a point at the upper
72 or western extremity of the canal and twenty (20) feet north of the north water line of said canal, running thence downstream along the bank of said canal and twenty (20) feet from the water line, as aforesaid, to the north line of the south half of private claim No. one (1), lately owned by Geo. W. Law; thence along said north line to the margin of the Fox river; thence upstream, along the margin of said river at low-water mark, to the up-er extremity of the guard lock at the head of the canal; thence to the point of beginning."

Plaintiff offered in evidence from the office of the plaintiff a map of Grand Kaukauna, showing the location of the dam in question, in reference to lot- five (5), six (6), seven (7), and eight (8) of section twenty-two (22); and the north side, called Jenne's map.

Defendant objected generally, and as incompetent and immaterial. Objection overruled. Defendant excepted.

A copy of this map is attached to this bill of exceptions, and is one of a series of maps showing the location of the entire line of the

improvement of the Fox river from Lake Winnebago to Green Bay.

Plaintiff offered in evidence the first page of the book containing said series of maps, on which appears the following: "Maps showing the canals, locks, dams, and water-power lots of the Fox and Wisconsin Improvement Company, surveyed by W. S. Nearing, assistant engineer, under direction of D. C. Jenne, chief engineer, 1859; scale, 100 feet to the ¾ inch." Also the following: "The red line is the base of the survey; the full red transverse lines indicate angles; the blue line the outer bounds of the land appropriated for the
73 benefit and use of the improvement. The figures on the dotted red transverse lines indicate the distance from the last angle; those on the full red transverse lines the length of the preceding courses, and those along the blue line the distance from the base. The water-power lots are numbered with small figures and the blocks with large figures."

This map is offered from the private record of the plaintiff, as the successors of the Fox and Wisconsin Improvement Company, to show the claim of title of the Fox and Wisconsin Improvement Company and the extent of it.

Defendant objected to the map and survey and all this class of testimony from a private office as immaterial and incompetent for the purpose of proving any title in the plaintiff; second, that it is immaterial and incompetent for all purposes. Objection overruled, and the defendant excepted.

The plaintiff then produced as a witness A. L. SMITH, who testified as follows:

I live in Appleton; am secretary and treasurer of the plaintiff; am now in charge of its office and records and maps. I was secretary and assistant treasurer of the Fox and Wisconsin Improvement Company from the early part of 1859 to the foreclosure and sale of its property under the trust deed to the Green Bay and Mississippi Canal Company. I knew Daniel G. Jenne. He was chief engineer of the Fox and Wisconsin Improvement Company; also W. C. Nearing. He was the assistant engineer. They are both dead. This book (the book of maps before mentioned) is the book of maps
of the lots, dams, lands, and property as made for the Fox
74 and Wisconsin Improvement Company, showing those. It was made by W. C. Nearing, under the direction of Daniel G. Jenne, in the fall of 1859. Since that time it has been in my charge, in the office of the Fox and Wisconsin Improvement Company and its successors, the plaintiff. The Fox and Wisconsin Improvement Company turned it over to the plaintiff.

Q. What does this blue line represent?

Defendant objected as immaterial. Objection overruled. Defendant excepted.

A. I understand that the boundary of the land appropriated and taken for the uses of the canal and building and maintaining it.

Q. Canals alone?

A. No, sir; there were other purposes along the shore, river, and around the dams, all through there from the pond up.

Q. How long has the company claimed the control of that blue line, to your knowledge?

Defendant objected as irrelevant and incompetent. Objection overruled, and defendant excepted.

A. Over thirty years.

Q. In what manner have they exercised control up to that line within that thirty years? What have they done inside of it?

Defendant objected to their showing anything except on the map they have offered in evidence. Objection overruled, and defendant excepted.

A. They have excavated it; they have built embankments and piled materials on it; such work as that.

Q. Have they refrained from doing anything on it that they wanted to do to maintain this line of water communication and business?

A. Nothing.

75 Q. Have they been, to your knowledge, interfered with within that blue line?

A. Not to my knowledge, except within a week.

Q. For what length of time, to your knowledge, have these two companies, the Fox and Wisconsin Improvement Company and the plaintiff, its successor, claimed title and control of the lands to that blue line?

Defendant objected as incompetent and immaterial. Objection overruled. Defendant excepted.

A. Ever since I have been connected with the companies, now for twenty-nine years. Prior to 1859 I was connected with the land office of the Fox and Wisconsin Improvement Company as clerk; first became acquainted with the land office in 1857; have kept the accounts and books showing the receipts and expenditures of the plaintiff and the Fox and Wisconsin Improvement Company since 1859.

On cross-examination he testified:

This book of maps does not bear the signature of Jenne. These are not recorded in any public office in the State of Wisconsin. I cannot say if they are public records. They are on the city map. They have not been recorded in any public office, unless it be the record on the city map. I think the Government has one copy. I gave the Government office one copy of these maps—the office of the Government in charge of the Fox and Wisconsin Improvement.

Plaintiff here offered in evidence the first two maps of Grand Kaukauna, of which copies are hereto attached and made a part of this bill of exceptions.

Cross-examination continued:

76 The shaded blue line on the maps of Grand Kaukauna shows the margin of the river, margin of the water. The engineer could tell how far the blue line is from the margin of the river. I think there are numbers on the map to indicate it; you would have to calculate from those figures. The Green Bay and Mississippi Canal Company was organized about August, 1866. The sale of the property of the Fox and Wisconsin Improvement Company took place February 2nd, 1866. Then there was a time between that and the organization of the plaintiff—a few months getting things ready.

Q. I want to know if, from your own knowledge, you have ever known that the Fox and Wisconsin Improvement Company or the Green Bay and Mississippi Canal Company ever had actual possession of the property located between the blue line on lot five, section 22, and the margin of the river.

A. The- built a bank there. I presume that is possession. I don't know that it runs along the shore; it may slope back from the shore: it is several feet back from the shore; walked up and down it five or six years ago; I went down from the dam. That embankment runs from the point where the dam abuts on lot *lot* five up stream. I don't remember that it went below the dam; my impression is that it did not.

Q. Do you know of either of the companies having actual possession of lot five, except that it was occupied by this embankment?

77 A. Only from the fact that they always claimed it. I do not remember of any special act on their part, except the common use. By the common use I mean they always used this place here for piling timbers and things. I do not say from my own recollection that I ever saw timber piled their [there] belonging to either of the companies. I cannot distinctly remember on lot 5 of any special act like that.

Q. They have not had possession of that portion of lot five between that blue line and the margin of the river during all these years?

A. I suppose they had; I suppose so from the instruction I received in the business and from maps—from a general understanding; never heard it disputed; never knew of any question to arise from it. I cannot recollect of any special exercise any more than the general authority—the general exercise of authority that within the blue line the land belonged to the canal company.

Q. What special authority on this part of lot five between the blue line and the margin of the river have these two companies exercised?

A. The dam was there and the material for the dam. That was before my day. The dam was not on lot five.

Q. That is all you know of the actual exercise of authority except the embankment?

A. The information I received uncontradicted; that is all. It is

a well-understood thing—unquestioned. I never looked up the titles to that to know whether there was any actual deed. I
78 so understood it. I do not know who has been the owner of lot five for the last thirty years. I gather from your representations that Beardsley was. Never saw any deeds to either of the companies of any part of lot five conveying any title to either of the companies of any part of lot five between the blue line and the margin of the river; have not seen any record of condemnation by the State of the improvement or the canal company of any part of lot five.

Q. Will you say that these companies have had actual possession of lot five between the blue line and the margin of the river all the time for twenty-nine years by piling lumber and material on it?

A. I could not say. They never fenced it, to my knowledge.

Q. Don't you know from your own knowledge that during the major part of that time neither of these companies ever had any materials on that part of lot five?

A. I could not say. That dam has been so constantly repaired that I have no doubt that material has been piled there, but couldn't say that I know it.

Q. Do you know of any part of that land being used by that company for any other purpose except for approaches and abuttal to the dam for bringing or conveying materials for the dam upon it or the embankment?

A. I cannot recollect of anything now. Yes, I understood your question. I stated it in substance. They maintained the
79 dam and this embankment. I do not know the actual width of the embankment, as it stands on the land on lots six and seven; the red line is the base of the survey; these figures indicate the width of it. I think Jenne went into the employ of the Fox and Wisconsin Improvement Company in 1855; he took control as engineer July 22d, 1856, and as business superintendent October 7th, 1856; he was employed as engineer prior to July 22d, 1856. Neither the Fox and Wisconsin Improvement Company or the plaintiff ever used any part of lots five, six, and seven of section 22, south of the river, for water-power purposes. The only use the State made of them for such purposes was the building of the dam; they never needed any part of lot five, to my knowledge, for any purpose, except in connection with the dam and embankment.

Q. The resolution of the board of directors directed the making of the map by Jenne July 7th, 1858. Then the map was made prior to that date?

A. No, sir; the map was not completed, as I understand it, until 1859. I suppose the surveys of *of* the lands commenced in 1858.

In redirect examination he said:

I suppose, from appearances, that land was used for the purpose of furnishing materials for the construction of the dam—building and maintaining the dam and embankment. I was not here then.

On cross-examination he said:

80 I cannot state that from my own personal knowledge; the excavation in the ground indicates it, but I can't say, from my own personal knowledge, that the earth from the excavation went into the dam; it looks as though it did; it is possible that the earth was carried off somewhere else. I did not see it done.

Here the defendant makes Mr. SMITH its own witness, and he testifies as follows:

I was never examined before upon oath as to the claim of the ownership of the water power furnished by the dams constructed by the State on the Fox and Wisconsin Improvement Company upon this river, unless it was before the board of arbitration. The Fox and Wisconsin Improvement Company always claimed all the water power which was furnished by the dam in question—I mean all the dams of the company; those at Depere and Menasha, the same as this, and Montello and Portage City. The company has never leased water or collected any rents for water power created by the upper dam at Appleton, on the north side of the river. The Fox and Wisconsin Improvement Company has claimed it, but I do not know that the State has. The Fox and Wisconsin Improvement Company did from time to time, in talking to these men about it. I cannot specify the time or the year, except in informal conversation with Conkey. In 1866 and before that time Mr. Conkey had a flour mill there and somebody had a rake factory. There was a race taken out on this side
81 from above the dam and water brought down on this side. Conkey had a mill there at this time. The Appleton Paper and Pulp Company, the Kimberly and Clark Company, with their respective interests, have several mills there. There are others claiming under them.

Q. Did you swear before the board of arbitrators in answer to this question: "Does the improvement company own the water on the north side of the river opposite the canal" (referring to Appleton)? In response to that question, did you answer: "They never made any claim to it, to my knowledge; they never filed any claim." Did you not so swear?

A. I presume, if you find it so; yes, sir. I probably stated that. I can see a little difference in the wording, "claim," there from what I might have meant. I presume the never entered a protest—nothing like a public claim to it. The object of that examination was to find out how much water power the company owned. They were trying to sell the canals and water power to the Government.

On cross-examination he said:

Mr. Conkey built the first dam on the north side of Grand chute, and not the Fox and Wisconsin Improvement Company or the board of public works or the canal company. That was Mr. Conkney's claim, when I claimed to him that the canal company or the Fox

$17,922.92; contingent expenses estimated at $12,000. This is offered to show what accrued to the contracts on estimates made.

86 Plaintiff offered record of the board of public works, showing actual indebtedness on the 1st of August, 1853: Scrip issued to Martin, $89,000; stock certificates under act of 1852, payable 1857, $57,000; unpaid warrants drawn by board of public works on the public treasury, $44,084: back money due contractors and other claims allowed by the board of public works July, 1853, $69,648.65.

Plaintiff offered in evidence the report of the joint committee of the Senate and House, appointed in 1856, to investigate the management of this improvement for the purposes of future legislation.

This reports shows the estimated cost of the improvement at $618,855.83, and the value of the hydraulic powers as $300,000.

Objected by defendant same as last above; overruled, and defendant excepted.

Plaintiff offered in evidence the judgment of foreclosure of the trust deed made by the Fox and Wisconsin Improvement Company to Spaulding, Butler & Mitchell; pursuant to the act of 1856, showing the amount of State indebtedness then unpaid to be $206,000, the payment of which was secured by said trust deed, and the other debts of said Fox and Wisconsin Improvement Company secured by said trust deed, including this State debt, amounted to $2,110,000; unsecured debts, $73,000; required to complete the works as provided by law, $60,000.

Plaintiff offered in evidence the report of sale by the trustees, directed by judgment to sell, of all this property covered by the trust deed, and personal property of the Fox and Wisconsin

87 Improvement Company, including all the water powers on the Fox river.

We show the report for the purpose of showing the sale of this property to the plaintiff; that the whole proceeds of the sale was $408,646.71; that the proceeds of the sale were applied, first, to the payment of the State indebtedness to the amount of $206,000; second, to the State treasurer to the amount necessary to complete the works as provided by law; and, third, the other indebtedness secured by mortgage, so far as the same would pay.

Plaintiff offered in evidence the receipt of C. H. Purcell, assistant State treasurer, to these trustees, showing payment of this State indebtedness, being Exhibit "S," on pages 136 and 137, canal company's documents.

Plaintiff also offered in evidence the receipt of C. H. Purcell to those trustees, showing payment of the amount adjudged to be necessary to complete the works as provided by law, being Exhibit "T," page 137, canal company's documents.

Plaintiff offered in evidence the order confirming the sale, pages 138 to 141, canal company's documents.

Also report showing distribution of the proceeds of the sale, pages 145 to 148, canal company's documents.

Also order confirming the report, pages 149 and 150, canal company's documents.

Also deed made by the trustees to the canal company, pages 151 to 159, canal company's documents.

88 This deed includes the land on which the dam in question abuts, on the north side of the river, and the lands below said abuttal, on the north side of the river, suitable for mill sites for the use of hydraulic power; also all the water powers and hydraulic rights of the Fox and Wisconsin Improvement Company, and all the franchises of said company.

Plaintiff offered in evidence the certificate of the filing of the bonds and of the releases fulfilling the conditions of chapter 98 of the Laws of 1853.

To all this documentary evidence and each item thereof as offered defendant objects on the ground that the same is immaterial, incompetent, and irrelevant. Objection overruled. Defendant excepts.

It was here stipulated that all the acts of the Legislature, both public and private, relating to this water-way and to the lands and water powers of the lower Fox river, and to the interests of the Fox and Wisconsin Improvement Company and of the plaintiff therein, should be deemed to be in evidence without any special offer of the same.

Plaintiff offered in evidence contract, Joshua Cox with the board of public works, for the completion of the works at De Pere in consideration of the water power maintained thereby, being the contract specified in chapter 277 of the Laws of 1850.

Admitted on claim of the defendant that Joshua Cox was the riparian owner at De Pere at and before that time.

Plaintiff offered in evidence contract, Fox and Wisconsin Improvement Company with Curtis Reed and Charles Doty, of the canal bottom and dam at Menasha, furnished by Reed and Doty in consideration of the water power furnished by the dam at Menasha.

Admitted on claim of the defendant that Reed and Doty were then riparian owners on both sides of the stream.

89 Plaintiff offered in evidence contract, Morgan L. Martin with the State, appearing in canal company's documents on pages 30*o* and 30*p*.

Defendant objected as imadvaterial [immaterial], irrelevant, and incompetent. Objection overruled. Defendant excepted.

Plaintiff offered in evidence record that Martin built *built* the Kaukauna dam mentioned in the complaint, under this contract, as appears from the records of the Fox and Wisconsin Improvement Company.

Defendant objects as immaterial, irrelevant, and incompetent. Objection overruled. Defendant excepted.

Plaintiff then produced as a witness B. J. STEVENS, who testified as follows:

I am a lawyer; reside at Madison; have been the attorney of the Green Bay and Mississippi Canal Company and for a long time was the vice-president—nearly from the organization of the company until within a year or two or three—I guess four years past. I was

the attorney of the Fox and Wisconsin Improvement Company and for a long time the attorney for the trustees of the Fox and Wisconsin Improvement Company.

Under the objection of the defendant as incompetent, immaterial, and irrelevant, which objections were overruled, and defendant duly excepted, he said:

It was my understanding and my assertion, when I had any occasion to speak on the subject, that the claim of the Fox and Wisconsin Improvement Company and of the trustees and of the Green Bay and Mississippi Canal Company extended to all water power in the river at [and] to all water power in the river made by the dams of the improvement. I have also claimed on behalf of the company
90 that we owned all the water power in the river, whether made by the dam or not. I will say this, further, that at the time of the board of arbitration proceedings I put my questions, or certain of them, upon the theory that — were the owners of at least all the water power made by the Government dams, and I think all of them upon that basis. I don't know that the responses to those questions would indicate that the witnesses understood the questions or all of them. Other than the board of arbitration proceedings, I don't know that I have made any official claim to the ownership of the water power. I think I made a lease at one time, and I conducted a litigation for the company against Heath here on the water power.

Under such objection and ruling and exception he testified further:

It has been explained to me repeatedly that the blue line on the company's maps indicate the limit of the appropriation by the company and the limit of its claim. I don't think I ever heard — the claim except from Mr. Smith and McDonald, who at that time was the engineer here when I came. I might have heard Morgan L. Martin say that was the line. It has been understood and — office talk that that was the limit of our claim.

Under the same objection, ruling, and exception he said:

William Barney bid for the purchasers at the sale on the foreclosure of the trust deed for that part of the property including these water powers. He did not bid for himself, but as the attorney of a committee of gentlemen who were appointed to represent themselves and others as purchasers at the sale. He had — and [an] inspection
91 of these schedules. I don't remember any other statements made to him than such as appear under the schedules themselves, but I know he examined all those schedules at that time and with me. His bid was based upon those schedules at that time. I do not know of any estimate put upon these water powers by the Fox and Wisconsin Improvement Company other than those which were made in two or three reports of the companies—made to the stockholders—made by the superintendents of the company to the stockholders, in which there are estimates made of the water power. One is the valuation given by Jenne and one

is by Westbrook. I only recollect these. I know these water powers were considered a large element of value, and a very high price was placed upon them by these men. At the arbitration proceedings it was a very difficult matter to so conduct the proceedings that the values would not be transposed and the water power considered of greater value than the improvements.

On cross-examination he said:

The gentlemen represented by Mr. Barney were the representatives, to some extent, of the holders of the bonds of the Fox and Wisconsin Improvement Company, but not wholly. The- held nearly all the State debt. The sale was for the benefit of both classes of indebtedness. The- were joint individuals who held indebtedness that was secured by the mortgage that was foreclosed. The property realized just enough to pay the State indebtedness and nothing on the bonds. All the men were interested both ways, as I now remember it. The litigation with Heath was a suit
92 brought to enforce a lease against Heath. It was at the lower dam at Appleton, north side. The Government canal is on the opposite side. Heath claimed to own water power because of his ownership of the land. I claimed that we owned the water power and he couldn't draw water through his canal and turn it through there. It ended in our buying the land. The claim there was the same as it is here. That controversy arose after the Green Bay and Mississippi Canal Company came into existence; pretty soon after.

Q. How long had Heath been in possession of the water power before you commenced suit against him?

A. There was a period of time that we did not get any rent on that lease. I don't remember. It was a good many years before the suit. I did not personally make any claim to anybody for rent in my life. I know this Heath lease was an original lease made by the Fox and Wisconsin Improvement Company on the lower dam at Appleton, on the north side. That is where the Heath litigation arose. I never made any claim to these parties except in conversation. I did at the time these parties were building this mill dam—not the Government dam, another dam. I did have a notice served upon the parties building it that we claimed the water power in the river. That goes beyond the claim we now make. That was after 1866—at the time they were just preparing to build this pres-
93 ent structure. The lease I spoke of at the lower dam at Appleton was made to Lehigh and Sampson. I did not say they were the owners of the soil; I assume they were.

Q. How early did there any question arise between you and the riparian owners here at Appleton as to your claim to all the water power in the river?

A. I do not know that any lease of the company was ever questioned until this one—that is, of my own recollection. I know, however, of this fact: that the parties were using water power at this end of the dam—the north end of the dam at Appleton. I know that Conkey claimed to have some right there which I never understood and ner [never] investigated; I never made an examina-

tion of that title to find out to this day. The chain of title to this end of the dam—the papers—are on my table now, sent to me for examination. I never made any assertion or claim myself to this water power at this end of the dam, the upper dam, except in conversation among our friends. I have frequently asserted to the directors of the company that we have title to the water power on the north side of the upper dam, and have been appointed one of a committee to investigate that claim. The committee have not acted as yet. I do not know personally of any person representing our companies claiming it, except in talks with Conkey. That was all friendly and all private. It was not done as a notice. The theory of the old Fox and Wisconsin Improvement Company was
94 that there was more advantage to the company in getting business up on the river from which they could collect tolls than from getting rentals from the water power.

Plaintiff called N. M. EDWARDS, who testified as follows:

I have been acquainted with this work since the first day of June, 1866. I was the engineer and superintendent of the Green Bay and Mississippi Canal for four or five years, and then, when it was turned over to the United States, I was employed by them as engineer in charge of the work for four or five years. Since that time I have been engineer for the company on their various works; have been familiar with these Jenne maps of the company.

Q. What have you understood those blue lines to indicate on these maps?

Defendant objected as incompetent, immaterial, and irrelevant. Objection overruled, and defendant excepted.

A. That that was the land either purchased or condemned or seized by the company for the improvement of the river either for navigation purposes or for water power; I do not know of any particular difference. I understood that that line indicated the boundary of the claim of the company. I understood that the company claimed that they had a right to use the land between the blue line and the water line for the purposes of the embankment and gravel and clay. I have known two dams at the head of the rapids at Kaukauna. The old dam was nearly opposite and little
95 below the original head-gates to the entrance of the Government canal, running thence across the river. The Jenne map gives the bearing north 46 degrees, 26 minutes east, running from the south side to the north side. I make the new dam on the north end 111½ feet below the old dam, and the south end I make it about 40 feet. I recognized what I took to be the spars in the original dam, and by platting the old dam from Jenne's map and reducing it I find that it corresponds to that location by bearings and distance, and the black lines all bring it to about 40 feet above the new dam—the old dam above the new dam. There was a coffer dam some 70 or 80 feet above the south end of the new dam, but that was tempor-y, I take it, from about the time the new dam was built.

Under like objection, ruling, and exception he testified:

The old dam was a rather poor dam. Many of the spars were broken out, and the crest of the dam had broken down. It had been repaired and patched up, yet was very leaky most of the time. I frequently had occasion to repair it while I was in charge of the company's works.

Under the same objection, ruling, and exception he said:

We repaired it by putting in new crest timbers on top and some new spars, raising, I think, and going down toward the toe of the dam, and filled it with gravel. We piled the timber on the shore; most usually around the end of the dam on the south side. There is a piece of land between the river and the blue line on the
96 south side of the river. I used that piece of land for that purpose.

Q. What other use have you ever made of that piece of land on the south side of the blue line?

Defendant objected as incompetent, irrelevant, and immaterial. Objection overruled, and defendant excepted.

A. We raised the bank at times; repaired the end of the crib, where the water run around the end of the crib, cleaned it out and put in new materials. I cannot say positively where we got the materials; I think most probably we took it from the adjoining land, but sometimes we used scow to bring it there from above. By the adjoining land I mean from right close to the end of the dam. I am very sure that we wheeled out dirt from the pocket or hole where dirt has been barrowed from, in that pit. I think we have taken it out; I am not positive. The other men we had would be more familiar with it. Mr. Dietrich was there. I did not ask him to come up. The embankment extends up the river to about the west side of section 22, township 21, 18. It would be some 1,600 feet above the dam by the shore line. I cannot say who built that dam. I kept it in repair until I left the Government employ nine or ten years ago. I think the old dam must have been a little lower than the present Government dam, except in the present there is a gap (of the new dam) of 100 feet or so that must be considerable lower than the old dam. The gap is three feet in depth. When they first put in the new dam I don't think the old dam had been disturbed much, as there was
97 quite a rapid flow over the dam—quite a distinct flow. When they came to gravel up the new dam thoroughly they threw out part of that to get the barge there to work and to get the scows there to work on the dam, and that lowered the water; that let the water run through, so there was not much show of rapids there now over the spars of the old dam. The ends of the dam were pretty near the same height as the ends of the old dam, but the center of the new dam was not quite as high as the center of the new [old] one. I tried one of the spars to-day and found the new dam six inches higher than that spar. There was another spar out farther, and I should judge it was a little higher, but I could not reach it. The new dam is a little longer than the old dam; then it has

this deep way in the center for the water. If the new dam was higher than the old it would still show a trifle over the top of the old dam; the water would break there because the new dam would get the current; there would be a greater velocity of water passing over the new dam. I don't know that I can say there was much difference between the height of the old dam and the new one; we repaired the breaks in the old dam. I don't know that it settled any while I was in charge. I cannot say which sets the water farther up the river, the present dam or the old one.

Q. How often did you have occasion to use that piece of land at the south end of the dam, within the blue line, between that and the river?

Defendant objected as incompetent and irrelevant. Objection overruled, and defendant excepted.

98 A. I think almost every season for eight or nine or ten years. There is an embankment from the south end of the dam across the whole length of lot five and lot six and lot seven. That embankment varies from a foot or two at the upper end to nine or ten feet at the dam. The dam I found to-day to be 8.35 feet high. Just below the dam there is an excavation. The natural bank is, I should say, three feet above the water below the dam.

Q. The balance of the embankment, to keep the water in above the dam, is on the surface of the bank?

A. I should say about four feet above the present water—height of the bank at present—and the water has a fall to the lower level of 8 feet and $\frac{35}{100}$, and perhaps the bank may be 3 or four feet; I should not say over 4 feet—the original level right opposite the dam, above the water—so it would leave about 8 feet of bank above, according to that—8 or 9 feet above the original level.

Q. How large a place has been excavated there at the end of the dam?

Defendant objected. Objection overruled, and defendant excepted.

A. When the dam was put in there there was a hole or pocket in there of 60 feet long and perhaps 40 feet wide in the widest part, extending up around this inside the line of the embankment for 60 to 80 feet, and there was a depression along up, generally along, the embankment. They must have barrowed to raise the bank. The width between the embankment and the blue line at present
99 on the ground right opposite the dam I make about 110 to 120 feet. I think the new dam is 30 or 40 feet longer than the old dam; it is a little more diagonal across the river, and the south crib is put a little farther south than the other—farther in the bank.

The old dam flowed the river about two miles above the dam. I do not think there would be very much difference between the flow of the old and the new dam; it flows up to the foot of the rapids.

Under the same objection, ruling, and exception he said:

I should say the cost of the old dam was 8,000 to 10,000 dollars. The Green Bay and Mississippi Canal Company expended on the old dam, while I had charge of it, perhaps $200 to $500 some years, amounting in all to, say, $3,000 to $4,000. In my estimate of $8,000 to $10,000 I took only the construction and not the cost of maintaining before I took care of it. I don't know of any special breaks, and without that I should suppose the costs of maintaining would not be more than I expended.

Under the same objection, ruling, and exception he said:

There was never, to my knowledge, any other occupant of this property within the blue line, while I had charge, other than that of the company, nor any claim of right to occupy that I know of.

On cross-examination he said:

I don't know that anybody occupied this flat land around the outside over against the blue line any further then there was a house on the flat near there, and than driving past across it. It was not fenced in. I think Sanders owned lot six in those days.
100 He had a house on lots six and seven; had a fence near the line, between lots six and seven, which run up pretty near to the foot of the embankment. Most of lot five was open and unfenced; nothing on the ground to distinguish where the blue line run. 150 to 200 feet from that was a highway across lot five. I know the new dam was built in 1875. I had very little to do with the construction of it; I had something to do with getting up the plans. I should say that the canal company used the space between the blue line, lot five, and the margin of the river to repair the dam and fixing the crib at the end of the dam. It was always a very convenient point to handle a load. We sometimes hauled the material with teams if it was plank; came across lots five and six to get on the bank. We would get on the bank with our plank and pile them on that and pile spars on the bank—on the top of the embankment. Maybe we sometimes used other portions of lot five outside of the blue line; don't think we did, more than driving over it; didn't use the space between the blue line and the river all the year around; only occasionally, when we had occasion to make repairs; perhaps some years only a week or two; then it would be three or four weeks to repair the break. It was a temporary use to repair the breaks. I have very strong recollections of wheeling plank and gravel up from some place there; can't say particularly as to the time and place or how often. When I wanted gravel along the dam for slight repair we borrowed the earth—
101 borrowed a little from the adjoining land. If we needed it over against lots 6 and 7, should have taken it off there. I have not surveyed out the blue line on the premises. If I had to be governed by it I should have surveyed it. My attention was called to the blue line there as soon as I came on the works. I found the Jenne map in the office, and I saw the blue line on it there. When I was first connected with the office I studied that up

among the first things to get information on the works. That was one of the principal sources of information, and I paid attention to it at once when I came here. Mr. A. L. Smith told me about it. Sometimes the question would come up about the blue line and whether we had a right at such places, and at such times we always talked as though we had full right. I never saw any evidence of title or any title of the canal company in the land between that blue line and the river except Jenn's map along on those lots. When the new dam was built the old one was partially torn out awhile after it was built—couldn't say how long. The old dam wouldn't hold the water there now if the new dam was removed—not very much. The house on lot six was removed at the time of the digging of the canal of the defendant. The embankment I have spoken of run right along the shore of the river—right to the margin of the river it extended—from the old dam, where it abutted on
the shore, clear up as far as it went, a continuous embank-
102 ment. I suppose it was really a part of the dam. It was put there to hold the water up—to prevent it overflowing the land. The object of the ditch along right back of it is partially to drain the land from the water that would work through the bank, and very likely it was convenient to take dirt from the ditch and build the bank, and partially to prevent the water that percolated through the banks from reaching the adjoining lands. In some places they paid little attention to that. The embankment run up near the west line of lot 8. Generally the Government took possession of such lands and property as the company turned over. I can't say about their taking care of that embankment. The Government had charge of the embankment after it took charge, in 1872. The embankment was in my care four or five years while I was in the Government employ. The top of the bulkhead in the canal is as high as the top of that embankment—about the same height. If they closed the bulkhead it would stop the water in the pond as effectually as the bank would if the bank had not been cut. The bulkhead is quite permanent—expensive stone-work, nicely laid and apparently strong. Probably it is as substantially as the embankment. The excavation I have spoken of at the southerly end of the Government dam was mainly made before I came on the works. It looked as if it was made — taking that material out of
it, which was probably wheeled on the embankment from
103 that. I have no personal knowledge on that subject. That excavation was two to four feet deep—carried down to the surface of the water in the natural stream. The excavation does not appear to have been made for any other purpose than for taking material for building and repairing that dam or embankment.

Under the objection of the plaintiff, overruled by the court, and exception by the plaintiff, this witness stated:

I should suppose the whole canal of defendant and bulkhead and walls connected with it cost, say, $150,000 to $200,000; a rough guess.

On cross-examination he said:

From 3,500 to 4,000 horse-power of water is furnished by the Government dam at Kaukauna, taking the fall down as far as the first lock of the canal, provided all the water was carried through the Government canal. They have used on the Government side of Kaukauna, up to the present time, 1,200 to 1,500 horse-power. I don't know how much the defendant has used on the south side.

For the purposes of this trial it was here admitted that the defendants are not drawing out more than one-half of the flow of the river into their canal.

On redirect examination this witness testified:

The upper lock of the Government canal is 2,300 feet below the head of the canal. There is a pretty sharp fall part of that way. I figured the head at the upper lock twelve to fourteen feet below the bridge. Right at the dam the head is nine feet or 8½, and the whole flow gives from 2,500 to 2,700 horse-power there.

104 It was admitted that the plaintiff owns land enough on the north side of the river practicable for mill sites to use the full flow of the river, provided they have right to the full flow.

Plaintiff offered in evidence the conveyance of the Fox and Wisconsin Improvement Company of all the parcels of river lands mentioned in the deed from the referees and trustees in the foreclosure suit to the Green Bay and Mississippi Canal Company for the purpose of showing that none of them were conveyed to the canal company until the fall of 1855.

Defendant objected — each one of the conveyances as immaterial, irrelevant, and incompetent. Objection overruled, and defendant excepted.

Plaintiff then produced JOHN P. DIETRICH as a witness, who testified:

I have lived at Kaukauna since 1842; was there when the first dam was built at the head of the rapids. The old canal company built it; have known it ever since it was built.

Under the objection of the defendant and against it- exception he said:

They have repaired this dam and graveled it when it was necessary since it was built; not every year. The water got high and we would take brush and put gravel on it. We used to cut the brush at the south end of the dam on these lots; timbe- and such stuff. We used to have to land it there and use it as fast as we needed it. Sometimes we piled stones there and carried them from that point to wherever we needed them. I have seen them piled there as often as any repairing was needed on the dam;
105 have seen stones piled there 5 or six times—early when the old dam was there. When that dam was graveled they got

gravel around below the dam and some just above—wheeled it up onto the dam. When Captain Edwards came on the works I came with him. They have landed as much there since he came as they did before. Before that there was a great deal of repairing done on the old dam.

On cross-examination he said:

I was employed on this dam after 1866; never worked on it before. My recollection is simply from being around there—of what I saw going on. They got brush and timber from the surrounding hills there. There was no fence there. You could get brush either side—there was no one to say anything; go on the land anywhere and cut it; it was all common. Most of the timber and brush were cut and got on scows and landed on the bank. We went four or five rods from the bank and cut brush on both sides of the river; piled that timber anywhere in the vicinity. All those piles that I saw there were in connection with the dam and embankment; couldn't tell whether earth was wheeled up from that place just below the dam. There was a break there when we first built the dam; there was a heavy pier. That was when they first built the dam, or soon after. The- got some since. Earth was brought down in scows from up the river. The- had a support at the south end of the old dam—a crib built of timber—and when that went out they put in a wall for the old dam; stood right in the bank; the dam
106 came against it. Then there was an embankment in the margin of the river, upstream from the dam, to hold the water. The timber to repair the dam was got there; some of it brought from both sides of the river. It was landed right up at the head of the dam—at the flats. The- didn't bring it every year; brought it when they repaired the dam. The earth that was wheeled up was taken from the land.

Plaintiff then produced PETER LEWIS, who testifies as follows:

I live at Kaukauna, and have since 1863. I knew the upper dam at Kaukauna 31 years ago, and worked on it pretty near every year. The dam was there 31 years ago. I have worked on it—repairing it—every year since.

This testimony was taken under objection of the defendant, with exceptions.

I came to Little Chute in 1855. In 1856 worked on the canal, and every year since I went to the dam when there was any repairing to do; went with a scow to the dam and put brush on every year it was fixed.

Q. What did you do on the south end of the dam at Kaukauna?

A. I was lock-tender, and I was there every day to watch it; I had a wheelbarrow. The water was so high that it came upon the hill. I got stuff in the wheelbarrow just where I could find it; near by, so that I would not have to wheel it far. I was there to

watch. I saw timber and stone and gravel and new spars and
107 such landed on the south end of the old dam. We put anything here that was left for the old dam or new dam for repairing. We put stone in that we brought in the scow from above—stone, gravel, and brush. When they put new spars in they landed the stone, or timber, or gravel, or brush above the dam, on the bank, right at the end, as near as they could. From 1855 to 1863 they did that sometimes twice a year; sometimes once. When the water was not very high I was not there at all.

On cross-examination he said:

I did not do it every year; didn't see spars or timber piled there every year, but I was there every year until 1863; did not cut the brush down opposite the dam; close by the dam it was all cleared off. That was up six or seven rods above the dam that I got the brush; it could be got on both sides of the river at that time. I don't know that it was done every year. The premises were not occupied all the time with brush or timber; only when the dam was repaired.

On redirect examination he said:

The- put the timber they brought down right on the bank above the dam. The- picked the stone up at any place. At that time below the dam the water was low. The- piled them on the dam—wheeled them around—piled them on the bank until they needed them, near the south end of the dam; the- piled the stone on the bank until they needed them. They got them on a scow.

Plaintiff offered in evidence from the proceedings of the board of public works, volume 1, page 3, public records of the board
108 of public works, the report of the chief engineer of the board, which is as follows:

"Finally, that a head of 3.83 can be obtained upon the line number two, and a fine water might be created on the left lock, if deemed desirable for the interests of the State, and a larger supply of water could be thrown into the Neenah, which would materially affect the volume of water in this stream—affect it beneficially for navigable purposes."

The report refers to the left lock at Portage.

Defendant objected as incompetent, immaterial, and irrelevant. Objection overruled, and defendant excepted.

Plaintiff offered in evidence from the same record, volume 1, page 7, reading from the report of the board of public works to the Governor made January 19, 1849:

"In the construction of the Portage canal and the improvements of the Fox extensive water powers will be created and considerable quantities of land will be rendered valuable for hydraulic and commercial purposes. To what extent this will increase the improvement funds it is not in the power of the board to make an approximate estimate. Much depends upon the policy which shall be

adopted by the Legislature in relation to the disposal of the water power and lands, but that in any event they will provide a large sum cannot be disputed."

Defendant objected as incompetent, immaterial, and irrelevant. Objection overruled, and defendant excepted.

109 Plaintiff offered in evidence from the same volume, page 220, from the report of the board to the Governor January 1st, 1851:

"At Grand Chute Theodore Conkey proposed for the consideration of that side of the river of section 1, lock 4, for the aggregate sum of $11,971.25, and the right to all surplus water for hydraulic purposes. This proposition, if accepted, would have fixed the location of the improvement on the west side, and was submitted to the Governor for his approval, which he declined to give, deeming the amount of work proposed to be done by Theodore Conkey of less value than the water power, and the location was changed to the east side and the work allotted to Fitch P. Talmage, he being the lowest bidder, for the aggregate sum of $56,747.64."

Defendant objected to this as incompetent, immaterial, and irrelevant. Objection overruled, and defendant excepted.

Plaintiff then offered in evidence from the same record, page 151:

"FORT WINNEBAGO, *May* 20, 1850.

Theodore Conkey, Esq.

DEAR SIR: As Governor Dewey declines to approve of the proposition made by you for the improvement of Grand Chute, believing that the water power that would be granted you in accordance with proposition would be infinitely more valuable than the amount of expense that you propose to make as compensation for it, therefore, with the consent and approval of the Governor, we make the following proposition to you, viz: That you enter into contract with the State to build the dam, section 1, canal, and lock No. 4 embraced
110 in it, free of all charge or expense to the State, and maintain the work under similar provisions and restrictions with those embraced in the act granting the surplus water to Joshua Cox, at De Pere, passed February, 1850, and in consideration of the above we propose to relinquish to you all the right of the State to all the surplus water for hydraulic purposes that may be created by such dam to be used by you, as far as lock number six on section three, the State reserving to itself a sufficient amount of water for the purposes of navigation and control and direction as to the manner of discharge of the water into and from the canal at the different points where it may be used.

ALBERT L. STORY,
CALEB CROSSWELL,
Board of Public Works."

Defendant objected as incompetent, irrelevant, and immaterial. Objection overruled, and defendant excepted.

On the same page plaintiff offered:

"Resolved, That in case the above-mentioned proposition is not acceded to that the location of the improvement shall be changed to the east side of the river, and another new dam shall be built, and the work allotted to Fitch P. Talmage, his proposition being the lowest."

Defendant objected as incompetent, immaterial, and irrelevant. Objection overruled, and defendant excepted.

Plaintiff offered in evidence the proceedings of the directors of the Fox and Wisconsin Improvement Company, on page 25, dated September 27th, 1853.

111 "Resolved, That a committee of three of the stockholders be appointed to report upon a series of rates at which water powers shall be leased to tenants at the different localities of hydraulic powers belonging to the company.

The president appointed Messrs. Peak, Martin, and Conkey as such committee."

Defendant objected as incompetent, immaterial, and irrelevant. Objection overruled, and defendant excepted.

Plaintiff offered in evidence, from page 36, under date November 28th, 1853:

"On motion of M. L. Martin, Resolved, That a committee of five directors be appointed, whose duty it shall be to make arrangements for procuring title to such lands along the Fox river as may be required by the company for commercial or hydraulic purposes."

Defendant objected as incompetent, immaterial, and irrelevant. Objection overruled, and defendant excepted.

Plaintiff offered in evidence, from page 61 of the same record, date of July 5th, 1854:

"Resolved, That the subject of title to the right of way and canal at Newasha, heretofore referred to the engineer, including the interest of the improvement company connected with the same, and also any proposition of the contract at the place in relation to the securities or other matters connected with the contract, and also any pending proposition in relation to the lock and canal and opening of the Neenah channel for navigation, right of way, or damages from flowing, etc., be referred to M. L. Martin, with full authority to act in the premises as the best interests of the company and the most speedy completion of the improvement may require."

112 Defendant objected as incompetent, immaterial, and irrelevant. Objection overruled, and defendant excepted.

Plaintiff offered in evidence, from the same record, page 149, under date of October 9th, 1856:

"Resolved, That proposition of Stewart and Jansen to lease from the company water power on the west end of the lower dam at Appleton sufficient for a saw mill and other light machinery connected therewith be referred to Mr. Conkey to superintend, with discretion-

ary power to make a lease on such terms and with such restrictions as may be safe and just to the company."

Defendant objected as incompetent, immaterial, and irrelevant. Objection overruled, and defendant excepted.

Plaintiff offered in evidence, from the same record, page 150, October 9, 1856:

"Resolved, That the vice-president, superintendent, and land agent be authorized and directed to ascertain the names of the several owners of the land occupied by and adjoining to all dams, locks, and canals of the company, and the prices at which can be purchased so much of said land as may be required for the use of the works and water power of the company, and report the same to the board, to the end that the title to the lands may be secured to and vested in the company as soon as possible.

Resolved, That the company thereby accept the proposition of M. L. Martin and Theodore Conkey to receive from the company its bonds to be issued for the payment of the lands at Grand
113 Chute, Kaukauna, and Little Chute, conveyed and to be conveyed by them to the company in accordance with the agreement contained in the minutes of the board of directors July 13th, 1855."

Defendant objected as immaterial, incompetent, and irrelevant. Objection overruled, and defendant excepted.

Plaintiff offered in evidence, from the same record, under date of October 31st, 1859, pages 248 and 249:

"Resolved, That the secretary of this board amend the proposition and subscription agreement for preferred stock heretofore issued by the board (with the consent of the subscribers thereto), so that the same shall read as follows: The property of the Fox and Wisconsin Improvement Company consists of—first, lands; second, water powers; third, channels of commerce. (First, land, I omit.) Second, water powers on the Lower Fox, a large river between Lake Winnebago and Green Bay, of only 35 miles in length; there is a descent of 170 feet. This descent is concentrated into water powers at nine different points by means of locks and dams. Three of these points are sold or occupied by flouring mills and factories. Lake Winnebago, which is the reservoir of this great water power, is thirty miles long and seven wide, and averages twenty feet in depth."

Defendant objected as immaterial, incompetent, and irrelevant. Objection overruled, and defendant excepted.

Plaintiff offered in evidence the report of the Secretary of War to Congress, dated March 8th, 1872, and the accompanying report of Major D. C. Houston to the Secretary of War, dated February 26th, 1872, and the act of Congress approving, June 10th, 1872.

114 Defendant objected as incompetent, immaterial, and irrelevant. Objection overruled, and defendant excepted.

Plaintiff offered in evidence the special message of the Governor to the Legislature in 1853, recommending the act of 1853 incorporating the Fox and Wisconsin Improvement Company.

Plaintiff rests.

Defendant called as a witness Col. C. A. FULLER, who testified as follows:

I am the engineer in charge of the Lower Fox river improvement, in the employ of the United States; have been since September, 1875. The contract for the building of the new dam was closed, I think, December, 1875. Work had been commenced on it when I came. The dam was not fully finished until the year 1876.

Q. Examine the Jenne map of the improvement at Kaukauna. You see what is designated. I am across Fox river by this map.

A. Yes, sir. That is a representation of the old dam. It correctly represents its location as near as I can judge of it. Never had occasion to verify it, because we were at work on the new dam. The new dam was built below the old one. My recollection is that the embankment extends up the river above the stone house, probably up on lots 6 and 7; can't state the width of the embankment at the bottom where it rests on the natural shore. It was built before I had anything to do with it. I just raised it on top a foot or so—put additional dirt on top. A man can travel on it. I never saw
115 any team on there, from [for] the top of the embankment runs gradually to the water.

By Mr. CARY:

Q. You never made any occupation of lot 5, except for the purposes of the dam and embankment connected with it?

A. No. When the original dam was in operation the embankment at the lower end was wide enough for a team to drive on for 100 to 200 feet, and then gradually decreased as it came up until it came down to 3 feet; possibly 2. The bank forms a continuous bank right down, now, to the surface of the water; the embankment comes to the shore without any berm.

It was admitted for the purpose of this action that the United States, being the owner of lots 6 and 7, section 22, township 21 north, of range 18 east, sold the same September 1st, 1835, to Gerrit V. Denniston, and immediately thereafter patented the same to said Denniston, and that the title to said lots afterwards passed by mesne conveyances to one John Hunt, prior to the 6th day of October, 1851, who held the title in fee on and after the 6th day of October, 1851, and that by several mesne conveyances from said Hunt and his grantees the title of said lots became and is now vested in fee in the defendant, Kaukauna Water Power Co., subject to the rights, title, and interest, if any, which the plaintiff has established in said lots by its proofs and pleadings in this case. This admission is not to prejudice the plaintiff's proofs or the defendant's claim that the plaintiff has no right, title, or interest in said lots.

116 Defendant offered in evidence the recorded plat of Ledyard, Outagamie county, recorded in the Outagamie county registry of deeds, in volume 2 of plats, on page 27, for the purpose of showing the location of the canal of the defendant, The Kaukauna Water Power Company, mentioned in the plat herein, at the place where it takes the water of the Fox river through the embankment mentioned; a copy of which is hereunto annexed and made part hereof.

Plaintiff objects as immaterial for any purpose except the purpose of showing the point at which the openin- is made into the river. Objection overruled, and plaintiff excepted.

Defendant then produced MORGAN L. MARTIN as a witness, who testified as follows:

I had a contract with the State or the board of public works, in behalf of the State, for the improvement of the Fox river between Lake Winnebago and Green Bay. Contract is dated May 14, 1851. The Fox and Wisconsin improvement organized and took possession of this improvement in 1853. My contract with the State was continued until 1855, I think, or 1856. We constructed a dam at Kaukauna. I was the contractor. It was constructed in 1855. We commenced it in the fall of 1854 by getting out material and being ready to put it in as soon as the warm weather commenced in the spring of 1855. I did not enter upon the bed of the stream for the construction of the dam prior to 1855; fall of 1854 or spring of 1855. I commenced at Kaukauna in 1854, very soon after the contract was made with the State, on the north side of the river.

117 I did not do any work on the south shore of the river until the fall of 1854 or spring of 1855. About the first thing was to put up the embankment. We made a canal and put in a guard lock on the north side, and the dam which I afterwards put in was built from that guard lock across to the other side of the river, and what lands that dam abutted on I can't say. My recollection is that I made the necessary arrangements with Hunt and abutted the dam on his land and built that embankment. I made the arrangement with Lawe and Grignon for the canal on the north side. I was the contractor under the contract originally made with the State, but at the same time I was superintendent of the company; don't recollect who owned the land east of the dam further down the river. I don't recollect about Hathaway representing Beardsley or being agent for him; have no knowledge how it was. I think the embankment was built up along the south shore, along the dam, the same year the dam was put in—in 1855, I think. No embankment before that time, I think. This embankment had to be built on a part of the dam to hold the water. My impression is that the mission-house must have stood on lot 6 or 7, not far from the line. There was a large clearing there, which had been cleared by the Indians. I think that clearing extended several rods below where the dam is located. There was a field there formerly cultivated and a road running further down to Beaulieau's mill.

118 It seems to me that there was brush growing up to within a

very few rods of where the south end of the dam was put. That place where the dam came up to the shore the land had been creared off and cultivated, but there was no cultivation there then. The mission-house was near the dividing line between lots six and seven. The clearing extended below the dam. My impression is that if this is Beardsley's lot and this Hunt's—my impression is that it would come here (marking on the sketch which plaintiff's counsel say would locate the dam on lot 6). The clearing did no-go down to Beulo's within a half a mile; should — it went not far from below the dam. Above the dam it went pretty near the high ground, I think. The clearing extended from the Indians' mill to a quarter of a mile below where the dam abuts up to the mission. Right back from the head of the old dam it was cleared land, back to the bluffs. How far that was I cannot say. I should not think it was as much as ten rods below the dam before you came to the brush. All the large timber had been cut, and there was nothing but brush along the river. When I commenced building this dam there was a bridge built just above the dam. It belonged to Lawe. The road run down on the south side, not far from the bank. It must have run very close to the river, because the bank was very steep below Bealeau's. From the time the Fox and Wisconsin Improvement Company organized, in 1853, until after I finished
119 building this dam—this Kaukauna dam—I was in charge of procuring privileges or right of way and the settlement of damages for the company; nobody else that I know of. I never paid Beardsly an- damages for any privileges upon land over against the dam.

Plaintiff objected as incompetent, immaterial, and irrelevant. Objection overruled, and plaintiff excepted.

Under the same objection, ruling, and exception he said:

I don't remember of ever receiving any deed from Mr. Beardsley or any written instrument authorizing me to put the dam or any embankment on lot 5, or of having any negotiations with Beardsley about the matter. I don't recollect of any such negotiations. If I made arrangements with Beardsley the papers must be on file in the office of the company. I have no recollection of any such transactions.

Under the same objection, ruling, and exception he further testified:

I have no recollection of taking any proceedings for condemnation of any privilege on or right or interest in the land at the south end of the Kaukauna dam. I did pay damages to Lawe for the flooding of his bridge, which was located immediately above the dam which I built at Kaukauna. I don't recollect of paying anybody else damages at that point except Lawe and Hunt—damages for Lawe's bridge and Hunt on the south side. That bridge was built after I made the arrangements with Lawe—a long time after I made the arrangements with him for right of way on the north side.

That on the north side was in 1851, and this with Hunt
120 in 1854. My connection with the improvement company in relation to this dam and embankment ceased in 1856, when I surrendered my contract. The books of the company will show. I have no recollection of Jenne's map. Westbrook was engineer in my time. I know of no line visible on the land over against the south end of the Kaukauna dam which indicated the extent of the possession which was supposed to be taken there by the State or by the Fox and Wisconsin Improvement Company; there was no fence built to show it. I don't think that the State or the improvement company had any possession on the south shore of the river except the dam and embankment. I was personally acquainted with Joshua Hathaway, the agent of Beardsley; he lived in Milwaukee.

Under the same objection, ruling, and exception he said:

I do not recollect of receiving any deed or release from anybody there at Kaukauna except Hunt. Lawe's bridge was paid for afterwards. The building of the dam set the bridge afloat, and we had to pay for it. Lawe built that bridge and owned it—individual enterprise. It was paid for as individual property to Mr. Lawe or Mead. In relation to the John Hunt release and as to whether the embankment had been built at that time, work of this kind was to be done in warm weather; so, with the date of this release before me, it impresses me with the idea that in October, 1854, this arrangement
was made. In the winter of 1854 and 1855 the material was
121 got out, and in the summer of 1855 the dam was put in, and the embankment on the shore was put up at the same time with the dam.

On cross-examination he testified:

When I built that embankment I did not find any lines staked out.

Q. In this conveyance I call your attention to the words "three feet in width, and upon the south or east side of said survey and stakes, as set by the engineer." Had the engineer been over that work before?

A. The engineer surveyed the embankments. The engineer must have puts stakes for the embankment where the embankment was to be.

Q. Did he place stakes at the end of the dam where the dam was to be put?

A. I can't answer that, but I suppose he did. There was an engineer in charge of the works—Mr. Westbrook. He directed where the embankments and dam should be put. I presume he staked out his work so the builder would know where to build when he came along. That Lawe bridge was paid for by the Fox and Wisconsin Improvement Company. I suppose this Hunt agreement was the authority I had for landing the dam on the south side. I don't know as I had authority for landing the dam on either side of the river. In the case of the Crouche dam I don't think I had any. I built it where the old dam was. I built a dam at Little

Chute. I think I got authority for landing that on the south side; I don't recollect from whom. We got every bit on the north
122 side. The books of the company will show. We were always ready to pay damages to everybody along the river. I don't know who owned the dam landing at Little Chute. I presume I got authority to land the dam there; can't now recollect. The only connection Conkey had with the matter is that he was my agent. Nobody that I know of made any claim for damages at Kaukauna besides Hunt and Lawe. I don't recollect anybody else. The board of public works was the proper authority for obtaining rights of way and settling damages as long as the State was doing the work, and what they did I don't know. I think they acted for themselves. I was one of the parties to give a release of all claims and demands against the State when this improvement was turned over by the State to the Fox and Wisconsin Improvement Company, and one of the parties to give the bonds provided in the act. I made the release to the State within 90 days. I can't say whether we took gravel for that dam and embankment at the excavation spoken of, at the south side of lot 5, at the south end of the dam; very likely we did—got the earth from this place. In our work there we always had a general engineer. You asked about staking the embankment there. I don't know how else. The engineer should place stakes there to show how long an embankment they were to make. I suppose the embankment was staked out by the engineer, which was Mr. Westbrook.

Q. How about that dam landing?

123 A. I think all that thing was done by Mr. Westbrook, who was engineer. I did the work on the north side on the canal at Kaukauna. That work was all carefully staked out and directions given by the engineer. He was right there in charge, attending to it all the time. I don't know that anything on the ground had been done by the engineer before I made my bid. The river had been examined before this work was laid out by Engineer Cram. He belonged to the engineer corps and acted for the United States. Alton was the first engineer for the State, I think. Before my contract with the State was made Alton went over the work as engineer. Anderson was his assistant, I think, and — Pennsylvania man sent by the United States. There was a location made of this Kaukauna dam and canal at the time I commenced. The first survey was whether the canal should be built on the north or south side of the river. Then the engineer designated the land, made a survey of the route of the canal, got the lift, and the contractor went to work under his direction.

Q. What is there that required a close survey of the work that was left off—that the engineer did not do?

A. He could not tell, for instance, how much embankment there was to be. He could not tell how much excavation there was there unless he made a very close survey. We did the work without any survey except the one made by the engineer when we did the work. He made his survey, of course, before we did the work.

124 I don't think there was any survey, or any part of it, until

Mr. Anderson did it when I commenced work; merely did such work as Mr. Anderson directed me to. I cannot state what surveys he made. I don't believe that there was any survey. Mr. David M. Loy represented me there. I had been on the spot a good many years before. When I got the contract I don't think — had been there. I don't think I was there between the time of making the contract and the time of the embankment. The only time I recollect of being there I went there on a special call to me when the dam was being put in. When it was put in the south end of it broke away, and the crib on which it rested was crowded downstream several rods.

Q. At that time did you represent both side—the contractors' and the company's side?

A. I was superintendent of the whole work for the company, I think, but whether I was appointed before the contract was given up or not I don't know.

On redirect examination he said:

This document on page 97 of canal company's documents is that release that was executed by me and the other parties named in the act incorporating the Fox and Wisconsin Improvement Company in 1853. I continued to work upon that contract until the canal company released me, in 1856. I built the Kaukauna dam under the contract made with the State in 1851. Under the terms
125 of this contract, I did it for the Fox and Wisconsin Improvement Company.

Defendant offered in evidence the release to the State by Martin and others, page 97, canal company's documents.

Defendant offered in evidence the record of a patent from the United States to Joshua Hathaway, Jr., of lot 5, section 22, township 21, range 18 east, recorded in Volume 2 of Deeds, page 206, Outagamie County Records, as follows:

"United States of America to Joshua Hathaway, Jr.

Certificate Number 334.

To all whom these presents shall come, Greeting:

Whereas Joshua Hathaway, Jr., assignee of Garrett V. Denniston, has deposited in the General Land Office of the United States a certificate of the register of the land office at Green Bay, whereby it appears that full payment has been made by said Garrett V. Denniston, according to the provisions of the act of Congress of April, 1820, entitled 'An act to make further provisions for the sale of public lands,' for lot number 5, fractional section 22, township 21 north, of range 18 east, in the district of lands subject to sale at Green Bay, Michigan Territory, containing 81 acres and $\frac{54}{100}$ acres, according to official certificate of said land returned to the General Land Office by the surveyor general, which said certificate has been purchased of said Garrett V. Denniston: Now, know ye that the

United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case
126 made and provided, have given and granted, and by these presents do give and grant, unto the said Joshua Hathaway, Jr., and to his heirs, said premises above described; to have and to hold the same, together with all the rights and privileges, immunities and appurtenances, of whatever nature thereunto belonging, to said Joshua Hathaway, Jr., to his heirs and assigns, forever.

In testimony whereof I, Martin Van Buren, President of the United States of America, have caused these letters to be made public and the seal of the General Land Office to be hereunto affixed.

Given under my hand, in the city of Washington, this 10th day of August, 1837, and of the Independence of the United States the 62nd.

By the President:

MARTIN VAN BUREN,
By A. VAN BUREN, *Secretary.*

J. F. WILSON,
Recorder of the General Land Office.

Recorded in volume 1, page 76. Received for record January 27th, 1854, at 2 o'clock p. m.

"B. FOLLETT, *Registrar.*"

The following stipulation was made:

It is admitted, for the purpose of this action, that the United States, being the owner of lot 5, section 22, township 21 north, of range 18 east, sold the same September 1st, 1853, to one Garrett V. Denniston, by duplicate, which he assigned to Joshua Hathaway, Jr., who received a patent from the United States therefor, which bears date August 10th, 1837, recorded in Volume 2 of Deeds, page 206, in the register of deeds' office of Outagamie county, who conveyed to Samuel Beardsley by warrantee deed dated
127 April 26, 1836, who held the title till his death May 7, 1860; that his heirs conveyed said lot to Stephen Frisby October 16, 1871, who conveyed his title to said lot through several mesne conveyances to the defendant, The Kaukauna Water Power Company, on the 14 day of May, 1880. It is admitted that the plaintiff made the conveyance to the United States of America, a copy of which is annexed to the defendant's answer in this case.

It is understood that the Hunt release, as set forth in defendant's answer herein, is in evidence. It is admitted that the plat of Ledyard introduced in evidence shows the correct location of the canal of the defendant, The Kaukauna Water Power Company.

MORGAN L. MARTIN was recalled by the defendant, and said:

My impression is that during the year in which the dam was built I was frequently at Kaukauna, where we had our boarding-house, and sometimes remained there several days at a time, and kept a very close eye upon the work at that point, including the dam and locks below.

The men at work at Kaukauna, I think, were employed by Loy, or perhaps by Conkey, and charged to me as contractor. From the north side at the guard lock, and near there, we could see across unto the south side very distinctly; the river was about 1,300 or 1,400 feet wide.

128 Loy had no relation to the improvement company. I don't recollect what relation Conkey had with the improvement company.

The foregoing is a true bill of exceptions in the foregoing-entitled case, and contains all the evidence produced by either of the parties to said action.

Attached hereto are the findings of fact submitted by plaintiff, and also by defendant; also plaintiff's exception to facts found and to failure or refusal to find facts proposed by him.

GEO. H. MYERS, *Judge.*

This bill of exceptions is satisfactory, and may be signed by the judge without notice to defendant's att'ys.

June 4, 1887.

A. L. CARY, *Att'y.*
DAVID S. ORDWAY, *Of Counsel.*

129 [Endorsed:] Circuit court, Outagamie county. Green Bay & Mississippi Canal Co. against Kaukauna Water Power Co. Bill of exceptions. Original. Filed July 21, 1887. F. C. Friedrichs, clerk. Filed July 22, 1887. Clarence Kellogg, clerk supreme court.

130 In Circuit Court, Outagamie County.

GREEN BAY AND MISSISSIPPI CANAL COMPANY
vs.
KAUKAUNA WATER POWER CO. *et al.*

Take notice that the plaintiff in this action appeals to the supreme court of the State of Wisconsin from the judgment entered in this action in favor of the defendants and against the plaintiff on the 21st day of March, A. D. 1887, by the circuit court of Outagamie county.

Dated this 7th day of June, A. D. 1887.

MOSES HOOPER,
Attorney for Plaintiffs.

To F. C. Friedrichs, clerk of the circuit court, and A. L. Cary, attorney for defendants.

Undertaking on above appeal is waived.

ALFRED L. CARY,
Att'y for Respondent.
DAVID S. ORDWAY,
Of Counsel.

131 [Endorsed:] In circuit court, Outagamie county. Green Bay and Mississippi Canal Company *vs.* Kaukauna Water Power Co. *et al.* Notice and undertaking. Due and personal service of the within ack. this 21st day of July, 1887. F. C. Friedrichs, clerk of court. Due and personal service of the within notice and undertaking acknowledged this 7th day of July, A. D. 1887, and cause may go onto August calendar. Alfred L. Cary, attorney for def'ts & resp'ts; David S. Ordway, of counsel. Filed July 21st, 1887. F. C. Friedrichs, clerk. Filed July 22, 1887. Clarence Kellogg, clerk sup. c't Wis.

132 Circuit Court, Outagamie County.

GREEN BAY AND MISSISSIPPI CANAL CO.
vs.
KAUKAUNA WATER POWER CO. *et al.*

STATE OF WISCONSIN, *Outagamie County,* } *ss.*:

I, F. C. Friedrichs, clerk of the circuit court in and for said county, do hereby certify that the annexed and foregoing are the original and all the papers and pleadings which have been filed in my office in the above-entitled cause, and the same are hereby transmitted to the clerk of the supreme court of the State of Wisconsin pursuant to the annexed notice of appeal and the direction of the attorney for the plaintiff.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court this 21st day of July, A. D. 1887.

F. C. FRIEDRICHS, *Clerk.*

133 [Endorsed:] Filed July 22, 1887. Clarence Kellogg, clerk sup. c't Wis.

134 STATE OF WISCONSIN, *Outagamie County:*

GREEN BAY AND MISSISSIPPI CANAL COMPANY, Appellant,
vs.
KAUKAUNA WATER POWER CO. *et al.*, Respondents.

On reading and filing this stipulation to the respective parties, by their attorneys, ordered that the clerk of this court return the record on the appeal in the above-entitled action to the circuit court of Outagamie county for the addition of certain exhibits to the bill of exceptions and for the perfecting of the same in any other particulars by the judge of said circuit court.

ORSAMUS COLE,
Chief Justice Sup. C't Wis.

STATE OF WISCONSIN, } ss:
Supreme Court, }

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared [SEAL.] the above and fo-egoing with the original order of Chief Justice Cole in the above-entitled cause, and that it is a correct transcript therefrom.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Madison, this fourth day of October, A. D. 1887.

CLARENCE KELLOGG,
Clerk of the Supreme Court of the State of Wisconsin.

135 [Endorsed:] Filed Oct. 22, '87. Clarence Kellogg, clerk sup. c't Wis.

(Here follows map marked p. 136.)

137 Be it remembered that at a term of the supreme court of the State of Wisconsin, begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to wit, on the ninth day of August, A. D. 1887, on the forty-fourth day of the term, to wit, on the 13th day of December, A. D. 1887—present Orsamus Cole, chief justice, and William P. Lyon, Harlow S. Orton, David Taylor, and J. R. Cassody, associate justices of said court—the following proceedings were had, *inter alia*, to wit:

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY, Appellants,
vs.
THE KAUKAUNA WATER POWER COMPANY, Bradner, Smith & Company, James C. Delaney, Charles D. Cased, David McCartney, James H. Elmore, Joseph Klein, The Milwaukee, Lake Shore and Western Railway Company, Badger Paper Company, and B. Aymer Sands, as Trustee, Respondents.

Appeal from Circuit Court, Outagamie County, State of Wisconsin.

This cause came on to be heard on appeal from the judgment of the circuit court of Outagamie county and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the circuit court of Outagamie county in this cause be, and the same is hereby, reversed, with costs against said respondents taxed at the sum of two hundred and twenty-five and $\frac{50}{100}$ dollars ($225.50), and that this cause be, and the same is hereby, remanded to the said circuit court with directions to give judgment for the plaintiff as indicated in and by the opinion of this court.

138 STATE OF WISCONSIN, } ss:
Supreme Court, }

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the court in the above-entitled action, and that it is a correct transcript therefrom.

[SEAL.]

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Madison, this 13th day of December, A. D. 1887.

CLARENCE KELLOGG,
Clerk of the Supreme Court of the State of Wisconsin.

[Endorsed:] State of Wisconsin, supreme court. Green Bay & Miss. Canal Company, app'l't, against Kaukauna Water Power Company *et al.*, resp's. Remittitur. Filed Apr. 2, 1888. F. C. Friedrichs, clerk.

139 State of Wisconsin Supreme Court.

GREEN BAY AND MISS. CANAL CO., Appellant,
vs.
KAUKAUNA WATER POWER CO. *et al.*, Respondents.

The plaintiff corporation controls and uses a portion of a water power at Kaukauna, in this State, created by a dam across the Fox river at that place, which was erected for the purpose of improving the navigation of that river, and claims to own all the surplus water power created by such dam. The water is drawn by the plaintiff from the pond above the dam into a canal on the north side of the river, and is there used by lessees of the plaintiff to propel machinery. The canal is a part of the improvement, and is navigated by boats and vessels. The defendant, Kaukauna Water Power Company, is the owner of the land on the south side of the river abutting such land and of land above and below the same on the river, and has constructed a canal for *of* the purpose of taking water through it from said pond to operate mills and machinery on its land below the dam. The other defendants are in the use of portions of the water so taken from the pond by the defendant corporation under and by virtue of leases thereof to them executed by the defendant, Kaukauna Water Power Company.

This action was brought to restrain the defendants from drawing water from said pond through the canal on the south side of the river, and also to compel the defendant, The Kaukauna
140 Water Power Company, to restore an embankment on lot 6 which it had removed or to permit the plaintiff to do so.

By an act approved August 8, 1846, Congress granted to the State of Wisconsin, when it should be admitted into the Union, a quantity of land to aid in the improvement of the Fox and Wisconsin rivers and to connect the same by a canal. This act contains certain re-

strictions not material to this case. By an act of the Legislature, approved June 29, 1848, the State of Wisconsin gave its assent to the act of Congress of August 8, 1846, which operated as an acceptance by the State of the grant therein contained upon the terms and conditions specified in the latter act. By an act entitled "An act to provide for the improvement of the Fox and Wisconsin rivers and connecting the same by a canal," approved August 8, 1848, the Legislature created a board of public works to supervise and carry on such improvements. Sections 15, 16, and 17 (which are most material in this case) are as follows:

"SEC. 15. In the construction of such improvements the said board shall have power to enter on, to take possession of, and use all lands, waters, and materials the appropriation of which for the use of such works of improvement shall in their judgment be necessary.

"SEC. 16. When any lands, waters, or materials appropriated by the board to the use of said improvements shall belong to the
141 State such lands, waters, or materials and so much of the adjoining land as may be valuable for hydraulic or commercial purposes shall be absolutely reserved to the State, and whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers such water power shall belong to the State, subject to the future action of the Legislature.

"SEC. 17. When any lands, waters, or materials appropriated by the board to the use of the public in the construction of said improvements shall not be freely given or granted to the State, or the said board cannot agree with the owner as to the terms on which the same shall be granted, the superintendent, under the directions of the board, shall select an appraiser, and the owner shall select another appraiser, who together, if they are unable to agree, shall select a third, neither of whom shall have any interest, directly or indirectly, in the subject-matter, nor be of kin to such owner, and said appraisers, or a majority of them, shall proceed to hear testimony and assess the benefits or damages, as the case may be, to the said owner from the appropriation of such land, water, or materials, and their award shall be conclusive, unless modified as herein provided. If the owner shall neglect or refuse to appoint an appraiser as herein directed, after ten days' notice of such appointment
142 by the superintendant, then such superintendant shall make such appointment for him."

From the award of the appraisers made pursuant to section 17 an appeal to the circuit court is given to either party by section 18 of the act, and the procedure therein is prescribed in the following sections.

The plan of making the improvements under the supervision of the board of public works proved a failure and was abandoned in 1853 by the enactment of chapter 98, Gen. Laws of that year, entitled "An act to incorporate an association for the completion of the improvement of the Fox & Wisconsin rivers," approved July 6, 1853. This act incorporated the "Fox & Wisconsin Improvement Co." and granted to it all the lands then unsold which had theretofore been granted by Congress to the State in aid of such improvement, subject

to certain conditions specified in the act. It also granted such company "the works of improvement contemplated by the act of August 8, 1848, and by several acts supplemental thereto and amendatory thereof, and known as the 'Fox & Wisconsin rivers improvement,' together with all and singular the rights of way, dams, locks, canals, water power, and other appurtenances of said works; also all the rights possessed by the State of demanding and receiving tolls and rents for the same, so far as the State possesses or is authorized to grant the same, and all privileges of constructing said works and repairing
the same, and all other rights and privileges belonging to the
143 improvement, to the same extent and in the same manner
that the State now holds or may exercise such rights by virtue of the acts above referred to in this section (section 2)."

Chapter 112, Laws 1856, renewed and confirmed the grant to the improvement company, but upon the condition, among others, that such company should, within 90 days after the passage of the act, make a deed of trust to three trustees, to be appointed by the Governor with the assent of the company, conveying to such trustees the lands thus granted to the company by the act, and all the other property, rights, and franchises belonging to the company, in trust for certain uses and purposes therein expressed. Such conveyance was duly made by the company, as required by the act, to the trustees duly selected for that purpose. By chapter 179, Laws of 1851, the Legislature authorized the Governor to enter into a contract with Morgan L. Martin for the completion of the improvement of Fox river between Green Bay and Lake Winnebago, and a contract to that effect was duly entered into pursuant to that act May 14, 1851. This was while the improvement was under the supervision of the board of public works. Under this contract Martin built the dam in question at Kaukauna in 1854 and 1855.

The Fox river at the point where such dam is erected runs nearly
east. At its north end the dam abutted upon land of the
144 improvement company, and at its south end on a lot desig-
nated as lot 5. West of lot 5, abutting on the river, are lots 6 and 7. A canal on the north side of the river is supplied with water from the pond. It is constructed with locks and is used for purposes of navigation. The south bank of the river was but little higher than the waters of the river in its natural state, and required an embankment to keep the same within the channel of the river. The company thereupon procured from one John Hunt, who was then the owner of lots 6 and 7, an instrument in writing, dated October 6, 1854, executed and recorded as a deed, in and by which Hunt released to the Fox & Wisconsin Improvement Company and its legal representatives "the right to erect and forever maintain an embankment of the dimensions as surveyed by the engineer of said company, reserving to myself the right to use said embankment when completed, but not so that the same shall be injured, through lots 6 and 7. Section 22. * * * Also the privilege of excavating a ditch along the south or east side of said embankment, not exceeding three feet in width, and upon the south or east side of said survey and stakes set by said engineer."

The company erected such embankment and extended the
145 same upon lot 5 to the dam. No authority from the owner of lot 5 to erect or abut the dam upon that lot or to build such embankment in front of it and no condemnation proceedings under the act of 1848 to obtain an appraisal of damages to such lot were proved on the trial.

The Fox & Wisconsin Improvement Company having made default in the performance of the conditions of the act of 1853 and of the trust deed above mentioned and of a certain mortgage in trust executed by said company upon all the property, rights, and franchises granted to it by the State as aforesaid, such trust deed and trust mortgage were duly foreclosed in the circuit court, and judgment for the sale of said property, rights, and franchises was entered February 4, 1864. Pursuant to that judgment such property, franchises, etc., were sold to the plaintiff, which was a duly organized corporation authorized by law to make such purchase. Out of the proceeds of such sale a debt of over $200,000 against the improvement, sometimes called (but erroneously) a State debt, was paid and the improvement completed at an expense of over $43,000. Thus the trust conferred upon the State by the act of Congress of 1846 was fully performed. Such sale was confirmed by the court, and the trustees in the trust deed before mentioned, who had previously been appointed by the court as referees to sell the mortgaged and trust property, duly conveyed the same to the plaintiff, The Green
146 Bay & Mississippi Canal Company. The only surviving mortgagee in trust joined as a grantor in such conveyance. By the terms of the deed the trustee, mortgagee, and referees as aforesaid granted, etc., to the plaintiff, its successors, etc., "the works of improvement known as the 'Fox & Wisconsin River Improvement,' together with all and singular the rights of way, dams, locks, canals, and other appurtenances of said works, the right of receiving tolls and rents for the same, and the privileges of said works, and all other rights, powers, and privileges by the State of Wisconsin granted to and vested in the Fox & Wisconsin Improvement Company and its trustees, or either, under and by virtue of the several acts of the Legislature of the State of Wisconsin in relation thereto, approved July 6, A. D. 1853, March 31st, A. D. 1855, and October 3, 1856, and the acts amendatory thereof and proceedings thereunder; to which said several acts of the Legislature and the trust deed and the mortgage referred to in the judgment under which the aforesaid sale was made reference is hereby made for a fuller and more particular description of the said works of improvement, rights, powers, privileges, etc. * * * Also all other corporate rights, privileges, franchises, powers, and property, real and personal, vested in and belonging to said company, its trustees, or both, forming a part of or in any way connected with said improvement, of whatever name or nature and from whatever source derived, and all appurte-
147 nances thereunto appertaining, including and together with all strips or parcels of land adjacent to said improvement or the water powers created thereby, with such exceptions therefrom as are hereinafter stated." The exceptions referred to do not effect this case.

By an act of Congress entitled "An act for the improvement of a water communication between the Mississippi river and Lake Michigan by the Wisconsin and Fox rivers," approved July 7, 1870, the Secretary of War was authorized, on certain terms and conditions, to purchase the rights, franchises, and property of the plaintiff in such improvement. By chapter 416, Laws of 1871, the Legislature authorized the plaintiff to make such sale. Arbitrators were duly appointed under the act of Congress to appraise the property, etc., of the plaintiff which the United States proposed to purchase. Such proceedings were thereupon had that on February 26, 1876, the arbitrators reported the total value of such property, etc., to be $1,048,070, and that the amount realized from the sale of lands granted to the State as aforesaid was $723,070, which last sum being deducted from the total value (as required by the act of 1870) left a balance of $325,000 to be paid for all the property and franchises of the company. This appraisal included all water power and personal property owned by the plaintiff. The board separately appraised the value of the water power belonging to the company at $140,000 and of certain personal property at $40,000. Under the authority of the act of 1870
148 the Secretary of War elected not to purchase such water power as personal property, and the same was thereupon reserved to the plaintiff in its conveyance to the United States of the property purchased by it. The specific description of the reserved water power is as follows: "The water power created by the dams and by the use of the surplus water not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto, and the lots, pieces, or parcels of land necessary to the enjoyment of the same and those acquired with reference to the same, all subject to the right to use the water for all purposes of navigation, as the same is reserved in leases heretofore made by said company, a blank form of which, attached to the said report of said arbitrators, is now on file in the office of the Secretary of War, and to which reference is here made, and subject also to all leases, grants, and assignments made by said company, the said lease, etc., being also reserved herefrom." The plaintiff owns the lots on the north side of the river along the canal on which the surplus water is used by its lesse-s.

The principal defendant, The Kaukauna Water Power Company, is the owner of lots 5, 6, and 7, on the south side of the river (or at least of the water fronts thereof), and of contiguous lands fronting upon the river east and below lot 5. These lots were purchased of the United States of [by] one Deniston September 1, 1835, and the same were patented to him or his assigns without reservation by the United States in 1837. Said company derives its title to such lots through mesne conveyances from Denniston.

149 In 1876 the United States erected a new dam at Kaukauna, across Fox river, 40 feet east of and below the old dam, at its south end, and 110 at its north end. The old dam still remains, but is flooded and rendered useless by the new structure. The embankment upon lot 5 was thereupon extended down the river by the United States to the new dam.

In January, 1881, the Kaukauna Water Power Company commenced to build a canal on its land with intent to cut the bank of the river on lots 5 and 6 and to draw water for hydraulic purposes from the pond raised by the dam in question. The plaintiff thereupon gave notice to that company in writing that it would resist the cutting of the embankment. The defendant company, however, proceeded with the cause, cut through the embankment on lots 5 and 6, but mostly on lot 6, and has since drawn and still draws water from such pond for the purpose of driving machinery located upon such canal. At the head of its canal the defendant company has erected and maintained a gate, which, when closed, stops the water as effectually as did the embankment which was cut through. By an act of Congress approved March 3, 1875, the United States assumed the payment of compensation for flowage or injury to lands caused by the improvements, for which compensation was legally owing when the act was passed, and authorized proceedings in the courts of this State to ascertain the same.

The foregoing facts appear from the pleadings of the court.
150 The circuit court dismissed the complaint upon the merits, with costs. From the judgment in that behalf the plaintiff company appeals to this court.

Moses Hooper and B. J. Stevens, for plaintiff; A. L. Cary and D. S. Ordway, for defendants.

LYON, *J.* (after stating the facts):

The controlling question in this case is, has the defendant, The Kaukauna Water Power Company, the right to cut the embankment on lots 5 and 6, on the south side of the river, and draw water from the pond made by the Kaukauna dam for the purpose of propelling machinery located in its canal below the dam? The solution of this question requires the determination of several other questions, which will be stated and considered in their order.

1. The claim of the plaintiff corporation to all the surplus water power created by the dam is based upon the proposition that section 16 of the act of the Legislature approved August 8, 1848, appropriates all such water power to the State. This proposition is disputed on behalf of the defendants. Their counsel maintain that section 16 only gives the State such surplus water power created by the improvement as may exist upon lands owned by the State, and that inasmuch as the State was not the owner of the lands upon which the Kaukauna dam was erected the section does not apply to the surplus water power thereby created. Their argument is, in substance, that, inasmuch as the first clause of the section only reserves to the State such land, water, or materials appropriated by the board for the use of such improvements as belonged to the
151 State, the last clause, which provides that water power created by the improvement shall belong to the State, must be held to apply only to such water power as is made by dams erected on State lands—in other words, they seek to apply to this section the maxim *noscitur a sociis*. We cannot adopt this construction. The statute absolutely reserves to *to* the State the property belonging

to it mentioned in the first clause, and at the same time confers upon the State the water power therein mentioned—that is to say, such water power as should thereafter be created "by reason of any dam erected or other improvements made on any of said rivers" (including the Fox river), which otherwise did not belong to the State. This was necessary in order to give the State the absolute control of the improvement, and such is the plain reading of the statute. Section 16 will be found copied in the foregoing statement of the case.

It requires no argument to demonstrate that the water power reserved to the State by section 16 of the act of 1848 was granted to the Fox & Wisconsin Improvement Company by chapter 98, Laws 1853; that the same passed to the plaintiff by the purchase under foreclosure of the trust deed and mortgage and the conveyance thereof to it by the trustees and mortgagees therein, and that in its conveyance to the United States the plaintiff reserved to itself all of the surplus water power created by the improvement. We conclude, therefore, that whatever rights the State took to the
152 Kaukauna water power by the act of 1848 (which is the absolute ownership of the whole thereof, if that is a valid act) is vested in the plaintiff.

2. It is further maintained on behalf of the defendants that, conceding the Kaukauna water power is within the provision of section 16 of the act of 1848, such act is invalid as to the surplus of the water power over and above that required for the navigation of the river, for the reason that it is taking private property for private use, which is beyond the power of the Legislature. Here, also, we are compelled to differ with the learned counsel for the defendants. It was necessary to erect the Kaukauna dam for the purpose of making the river at that point available for navigation. Without it slack-water navigation would have been impossible. It was of vital interest, therefore, to the State that it or the corporation to which it entrusted the preservation and maintenance of the improvement should have the entire and absolute control of the dam, embankments, canals, and all appliances necessary for the purposes of navigation, as well as of the waters in the pond created by the dam. It would be a serious detriment to the public interests were each riparian owner entitled to cut the dam, or the embankment which is a part thereof, and draw water from the pond. The exercise of such a right might, and probably would, seriously interfere with
153 the proper management of the improvement greatly to the detriment of the free and unrestricted navigation of the river. It was impossible to make the improvement in a proper manner and to meet the requirements of navigation without creating some surplus water power, but for the reasons above suggested such surplus was merely incidental to the improvement.

In Attorney General *vs.* City of Eau Claire, 37 Wis., 400, and again in State *vs.* Eau Claire, 40 Wis., 533, it was held that a statute which authorized the city of Eau Claire to erect a dam and raise the waters of the Chippewa river for the purpose of erecting public water works in said city, and which granted to the city the right to

lease the surplus water power created by such improvement, was a valid law. In the opinion of the court, prepared by Ryan, C. J., in each case, speaking of the power granted to the city to construct water works, it is said: "That is so essentially a public and municipal purpose it is evident that the city can take any ligitimate power in aid of it. For that purpose the Legislature could unquestionably grant and the city take power to construct and maintain a dam not obstructing the navigation of a public river or violating other right, public or private, and the dam so authorized might well produce an excess of power. *Superflua non nocent.* In such a case, as was frankly admitted on the argument, the surplus water need not run to waste. The Legislature might well grant and the city take power to lease it. The power to construct and maintain the dam would still rest on *on* the public municipal use, not on the
151 disposition of the accidental excess. Spaulding *vs.* Lowell, 23 Pick., 71." Manifestly the principal of that case is applicable here.

3. It is further claimed on behalf of the defendants that by locating the south end of the dam upon lot 5, building an embankment thereon, and on lots 6 and 7, and appropriating the whole water power created by the dam, the State took the property of the owners of those lots, and that the laws of the State made no adequate provision for compensating them therefor. A riparian owner upon a navigable stream has no right, without legislative consent, to build a dam across such stream for any purpose. Improvement Company *vs.* Lyons, 30 Wis., 61. He has the right, however, to pass from his land to the river and from the river to his land, and to utilize the waters of the river upon his land for any purpose not interfering with navigation of the stream or the rights of other riparian owners. That the construction of the Kaukauna dam and improvement by the State and its appropriation of the water power thereby created take the property of the owner of lot 5 and deprive him of his riparian rights just mentioned (which are also property), does not seem to admit of doubt or controversy. Such owner has never been compensated for his property so taken; neither has he released his right thereto.

As to lots 6 and 7, we incline to the opinion that the instrument denominated a release, executed by Hunt to the Fox and Wisconsin Improvement Company in 1851 (Hunt being then the owner of those lots), in and by which he granted to that company and
155 its legal representatives "the right to erect and forever maintain an embankment of the dimensions as surveyed by the engineer of said company," operates as a surrender of all riparian rights appurtenent to such lots not reserved in the instrument. The instrument recites a consideration of $100, and Hunt reserved therein "the right to use said embankment when completed, but not so that the same shall be injured." He also reserved the right to excavate a ditch of certain dimensions on the land on the south side of the embankment. The embankment was surveyed and located along the margin of the river, and was so granted and erected for the pur-

pose of confining the waters of the river within its natural banks after it should be raised by the erection of the dam.

The act of 1848 is certainly liable to the criticism that it makes no adequate provision for compensating the owners of property taken for the improvement. True, it contains provisions in section 17 (which section is copied in the statement of the case) and in subsequent sections for the condemnation of private property to the use of the improvement. Because of these provisions, Dixon, C. J., in delivering the opinion of the court in Arimoud *v.* Canal Co. (this plaintiff), 31 Wis., 316, controverted a supposed statement of the Supreme Court of the United States in Pumpelby *vs.* same Co., 13 Wall., 166, to the effect that the laws of this State failed to provide for making such compensation.

We all overlooked the fact that the court in that case was determining the sufficiency of certain pleas, and only stated the case made by such pleas. It did not assume to say what were the laws of this State on the subject.

156 But the act of 1848 failed to give the land-owner the right to institute condemnation proceedings under it, to have his compensation determined; and if the State should institute such proceedings, the compensation; when determined, was, by section 21 of the act, made payable out of the fund appropriated to such improvement. By section 20 the recording in the office of the register of deeds of a transcript of the award signed by the appraisers and acknowledged or proved as a conveyance of land operated to vest in the State the fee simple of the premises condemned to the use of the improvement; this without requiring the sum so awarded as compensation to be first paid. The history of the improvement during the time it was in the hands of the board of public works and of the Fox & Wisconsin Improvement Company shows that the improvement fund was a very uncertain source to rely upon for the payment of a debt charged upon it. No other provision was made in the act of 1848, or in any other act of the Legislature, for the condemnation of property to the use of the improvement, or for payment therefor. In view of these serious defects in the law, and especially because the owner of the property taken for the purposes of the improvement was powerless to institute proceedings to have the compensation ascertained to which he was entitled, Mr. Justice Orton said, in Sweany *vs.* U. S., 62 Wis., 396, 22 N. W. Reporter, 609, that until the act of Congress of 1875 there was no provision of law for the ascertainment and payment of the damages and compensation for the taking of lands by flowage or otherwise for the use of the improvement.

157 Looking to the practical operation of the statute, the statement thus made is substantially correct, although perhaps inaccurate in theory and form.

But whatever defects inhered in the act of 1848, they ceased long since to be of any importance. That act was fully executed, the improvement which it authorized has been made and ever since maintained, and the title thereto, except to the incidental surplus water power reserved by the plaintiff, has passed to the United States.

The failure of the State Legislature to provide adequate compensation for private property taken for or injured by the improvement has been supplied by the act of Congress of 1875, in and by which an easy method is provided to ascertain the compensation to which the owner of such property is entitled and the United States has assumed the payment thereof. Jones *v.* U. S., 48 Wis., 385, 4 N. W. Rep., 519, affirmed in 109 U. S., 513; Sweany *v.* U. S., 62 Wis., 396, 22 N. W. Rep., 609.

4. A prescriptive right to maintain the south half of the dam on lot 5, founded upon 20 years' uninterrupted adverse uses, is claimed on behalf of the plaintiff. Inasmuch as we are of the opinion that the United States has the legal right to maintain the dam on lot 5 without regard to any prescription, it is quite immaterial whether such claim is well founded or otherwise. It probably is not well founded as to the additional embankment constructed from the old to the new dam; perhaps not as to the portion of the new dam on lot 5 which includes all of the structure south of the centre of the stream. But however the question of prescription should be decided, were it material, it seems quite clear that no statute of limitations has run against the right of the present owner of lot 5 to
158 recover of the United States compensation for the portion of that lot taken for the improvement and for the injury to the lot caused thereby.

The act of Congress giving such compensation was approved March 3, 1875, and it provided for the payment of such claims legally owing at that date. The act by its terms provides for cases in which "compensation is now or shall become legally owing." Of course it speaks from the date of its approval. The original Kaukauna dam was not erected on lot 5 until after March 3, 1855. This satisfactorily appears by the testimony of Hon. Morgan L. Martin, who erected the dam. He testified, in substance, that he entered upon the bed of the stream for the construction of the dam after warm weather commenced in the spring of 1855. Of course, in the latitude of Kaukauna that must have been later than March 3d. We suppose the right to compensation was not cut off until a prescriptive right to maintain the dam had matured by 20 years' adverse uses. Hence, when the act of March 3d, 1875, was passed 'compensation was owing to the owner of lot 5 for the taking of and injury to his property, which is still a valid claim against the United States; and this, we think, includes any deprivation or interruption of any legal riparian right. On this subject, generally, see the cases of Jones *v.* U. S. and Sweany *v.* U. S., above cited.

5. It follows, we think, from the views above expressed that neither of the defendants had any right whatever to draw water from the pond in question, and that the plaintiff is the legal owner of the water power created by such dam over and above what is required for navigation. The plaintiff was therefore entitled to an
159 injunction restraining the defendants from drawing f[off] the water from the pond for the purposes aforesaid.

6. A mandatory injunction requiring the water power company

to restore the embankment or at least to allow it to be done is also prayed. The dam and embankment belong to the United States. The plaintiff has no legal interest therein, no duty in respect to it, and no right to interfere with it unless by permission of the Government. It is only interested in the surplus water power created by the Government works and maintained at such height as the Government chooses to maintain it. The Government may lower the dam and embankment or may remove the same and destroy the water power entirely and the plaintiff cannot prevent it. The Government may also use such appliances as it chooses to keep up a head of water. It may retain the embankment on lots 5, 6, and 7 or use some other means of holding the water, and the plaintiff is in no position to object; hence it is entirely a question between the United States and the Kaukauna Water Power Company whether such embankment shall be restored where the company cut through it or whether the head-gates of the canal, which when closed stop the water as effectually as did the embankment, shall be allowed to remain in place of the embankment. The plaintiff has no voice in the determination of that question; hence the prayer for a mandatory injunction compelling the water power company to *the* restore the embankment or to allow the plaintiff to do so must be denied.

160 We do not here determine the relative rights of the plaintiff and other riparian owners below the dam in respect to the use of the water which would run over the dam if not taken from the pond into the canal, nor do we consider whether there is any restriction upon the manner or place in which the water shall be returned to the river below the dam. We only hold that the plaintiff owns the surplus water power created by the dam and that the defendants have no legal right, without the consent of the plaintiff, to draw water from the pond with which to propel machinery.

We have been greatly aided in our investigation of the case by the very able arguments of the respective counsel, which furnish evidence of great learning and research. The case is a very important one and any judgment finally entered in it may, probably will, be far-reaching in its effect upon water rights on the Fox river. The writer ventures to express the opinion that there are Federal questions involved in it which will support an appeal to the Supreme Court of the United States, and the desire that such an appeal may be taken to the end that the relative right of the plaintiff and other claimants to water power created by the improvement of the Fox river now owned by the United States may be finally determined by that tribunal.

The judgment of the circuit court is reversed, and the cause will be remanded with directions to that court to give judgment for the plaintiff, as indicated in this opinion.

161 STATE OF WISCONSIN, }
Supreme Court. }

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared the above and

foregoing with original opinions of the court, on file in my office, in the above-entitled cause, and that it is a correct transcript therefrom.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Madison, the 13th day of December, A. D. 1887.

CLARENCE KELLOGG,
Clerk of the Supreme Court of Wisconsin.

162 [Endorsed:] State of Wisconsin, supreme court. Green Bay and Miss. Canal Co., app'l't, against Kaukauna Water Power Co. *et al.*, resp't. Certified copy of opinion by Lyon, J. Filed Apr. 2, 1888. F. C. Friedrichs, clerk.

163 Supreme Court of Wisconsin.

GREEN BAY & MISSISSIPPI CANAL COMPANY, Appellant,

vs.

KAUKAUNA WATER POWER COMPANY *et al.*, Respondents.

LYON, *J.:*

Each party has moved for a rehearing of the cause. We do not care to discuss the case further on the defendants' motion, as we find nothing in the argument in support of it which leads us to distrust the accuracy of the judgment hereinbefore announced.

The plaintiff's motion is not for the purpose of changing the judgment, but to procure a modification of what is said in the opinion respecting the relative rights of the plaintiff and the United States in the improvements which create the water power in controversy. What was there said on that subject seemed to be called for by the prayer for a mandatory injunction contained in the complaint. It was certainly pertinent to that branch of the case, and hence not *obiter dictum.*

Yet it is not absolutely essential to a determination of the right to such injunction. The refusal of such injunction may as well be rested in the discretionary power of the court in that behalf.

Inasmuch as the head-gates to the defendants' canal stop the water as effectually as would an embankment of earth, and the
164 plaintiff is not injured by leaving the gates as they are, a refusal of the injunction prayed is a very proper exercise of the discretion of the court.

Because the United States is not a party to this litigation and because the question of its rights in the works of the improvement, as affecting the plaintiff, has not been fully argued, we are constrained to so far modify the former opinion as to leave the question of the relative rights of the plaintiff and the United States in and to the same and other works pertaining to the Fox river improvement open and undetermined. A rehearing is unnecessary.

Each motion is denied, with $25.00 costs.

165 STATE OF WISCONSIN, }
Supreme Court. }

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original opinion of the court, on file in my office, in the above-entitled cause, and that it is a correct transcript therefrom.

In testimony whereof I have hereunto set my hand
[SEAL.] and affixed the seal of said court, at Madison, the 11th day of May, A. D. 1888.

CLARENCE KELLOGG,
Clerk of the Supreme Court of Wisconsin.

166 [Endorsed:] State of Wisconsin, supreme court. Green Bay & Miss. Canal Co., app'l't, against Kaukauna Water Power Co. *et al.*, resp'ts. Certified copy of opinion by Lyon, J. Filed May 12, 1888. F. C. Friedrichs, clerk.

167 Circuit Court, Outagamie County.

GREEN BAY AND MISSISSIPPI CANAL COMPANY
vs.
KAUKAUNA WATER POWER COMPANY *et al.*

Stipulated that the answer already made by the defendants, Kaukauna Water Power Company, Bradner, Smith & Co., Milwaukee, Lake Shore and Western Railway Company, and Badger Paper Company, in this action shall stand for and be the answer of the defendant, B. Aymer Sands, trustee, herein.

Dated March 17th, 1886.

MOSES HOOPER,
Plaintiff's Attorney.
ALFRED L. CARY,
Attorney for Defendant, B. Aymar Sands, Trustee.

168 [Endorsed:] Circuit court, Outagamie county. Green Bay & Mississippi Canal Company *vs.* Kaukauna Water Power Company *et al.* Stipulation as to answer of defendant, B. Aymar Sands, trustee. Filed Apr. 30, 1888. F. C. Friedrichs, clerk.

169 STATE OF WISCONSIN:

In Circuit Court, Winnebago County.

GREEN BAY & MISSISSIPPI CANAL CO., Plaintiff, }
vs.
KAUKAUNA WATER POWER CO. *et al.*, Defendants. }

STATE OF WISCONSIN, }
Winnebago County, } *ss:*

Moses Hooper, being duly sworn, on oath deposes and says that The Kaukana Water Power Company, The Milwaukee, Lake Shore

and Western Railway Company, Badger Paper Company, and B. Aymar Sands have appeared in this action by Alfred Carey, as their attorney; that the defendants, James C. Delaney, David McCartney, James E. Elmore, Joseph Klein, have not nor has either of them, in person or by any attorney, appeared, answered, or demurred in this action, but that each of said last-named defendants was served with the summons and complaint in this action, as appears by the affidavit attached thereto, more than twenty days before this date.

MOSES HOOPER.

Subscribed and sworn to before me this 13th day of April, 1888.

E. W. WEISBIRD,
Notary Public, Wis.

170 [Endorsed:] In circuit court, Outagamie county. Green Bay and Mississippi Canal Co., pl'ff, *vs.* Kaukauna Water Power Co. *et al.*, def'ts. Affidavit. Filed Apr. 30, 1888. F. C. Friedrichs, clerk.

171 STATE OF WISCONSIN:

Circuit Court, Outagamie County.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY, Plaintiff,
vs.
KAUKAUNA WATER POWER COMPANY, BRADNER, SMITH & COMPANY, James C. Delaney, Charled D. Cassed, David McCartney, James H. Elmore, Joseph Klein, Milwaukee, Lake Shore and Western Railway Company, Badger Paper Company, and B. Aymar Sands, as Trustee, Defendants.

General April term, A. D. 1888, of said court, held at the courthouse, in the city of Appleton, county of Outagamie and State of Wisconsin.

Present: Hon. George H. Myers, circuit judge.

An appeal having been taken to the supreme court of the State of Wisconsin by said plaintiff from the former judgment rendered by this court in this action in favor of said defendants and against said plaintiff, and said supreme court having remitted to this court the papers transmitted to said supreme court on said appeal, together with its decision, in words and figures following, viz:

"Be it remembered that at a term of the supreme court of the State of Wisconsin, begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to
172 wit, on the ninth day of August, A. D. 1887, on the forty-fourth day of the term, to wit, on the 13th day of December, A. D. 1887—present Orsamus Cole, chief justice, and William P. Lyon, Harlow S. Orton, David Taylor, and J. B. Cassody, associate justices of said court—the following proceedings were had, *inter alia*, to wit:

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY, Appellant, *vs.* THE KAUKAUNA WATER POWER COMPANY, Bradner, Smith & Company, James C. Delaney, Charles D. Cassed, David McCartney, James H. Elmore, Joseph Klein, The Milwaukee, Lake Shore and Western Railway Company, Badger Paper Company, and B. Aymar Sands, as Trustee, Respondents.	Appeal of Circuit Court, Outagamie County, State of Wisconsin.

This cause came on to be heard on appeal from the judgment of the circuit court of Outagamie county and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the circuit court of Outagamie county in this cause be, and the same is hereby, reversed, with costs against the said respondents taxed at the sum of two hundred and twenty-five and $\frac{50}{100}$ dollars ($225.50).

And that this cause be, and the same is hereby, remanded to the said circuit court with directions to give judgment for the plaintiff, as indicated in and by the opinion of this court," and opinion of said supreme court being on file herein; and it appearing to
173 the court that the defendants, Kaukauna Water Power Company, Bradner, Smith & Company, Milwaukee, Lake Shore & Western Railway Company, Badger Paper Company, and B. Aymar Sands, as trustee, have appeared in this action and are represented therein by their attorney, Alfred L. Cary, of Milwaukee; and it further appearing that the summons and complaint herein was duly served on the defendants, David McCartney, James C. Delaney, James H. Elmore, and Joseph Klein, more than twenty days before this date, and that neither of said last-named defendants have appeared, answered, or demurred herein; and it further appearing from the files of this court that an order has been entered therein discontinuing the said action as to and as against the said defendant, Charles D. Cassed, on the ground that he has no interest in the property sought to be affected in this action and has not been served with process herein, and due notice of this application having been served upon the said attorney for said defendants: Now, on motion of Moses Hooper, attorney for the plaintiff, and pursuant to the said decision and opinion of said supreme court, it is here by this court ordered and adjudged that the defendants herein, Kaukauna Water Power Company, Bradner, Smith & Company, James C. Delaney, David McCartney, James H. Elmore, Joseph Klein, Milwaukee, Lake Shore and Western Railway Company, and B. Aymar Sands, as trustee, and all and singular their agents, servants, and em-
174 ployés and all persons and corporations claiming through or under them or either of them, be, and they hereby are, perpetually enjoined and restrained from drawing any water from the pond maintained by the dam across the Fox river, in the city of

Kaukauna, in the county of Outagamie and State of Wisconsin, resting upon the south side of said river, upon lot five (5) of section twenty-two (22), south of the river, and upon fractional section twenty-four (24) on the north side of the river, in town. twenty-one (21) north, of range eighteen (18) east, of the fourth (4) principal meridian, mentioned in the complaint, for hydraulic power.

It is also further considered and adjudged that the plaintiff is the legal owner of the water power created by such dam over and above what is required for navigation.

It is also further ordered and adjudged that the plaintiff do have and recover of the defendant, Kaukauna Water Power Company, the sum of one hundred & ninety-three & $\frac{22}{100}$ dollars for its costs of this court in this action.

Dated May 9, 1888.

By the court: GEO. H. MYERS, *Judge.*

[Endorsed:] In circuit court, Outagamie county. Green Bay and Mississippi Canal Company *vs.* Kaukauna Water Power Company *et al.* Judgment. Filed May 9. 1888. F. C. Friedrichs, clerk.

175 STATE OF WISCONSIN, } *ss:*
Outagamie County, }

I, F. C. Friedrichs, clerk of the circuit court of said State in and for the county aforesaid, do hereby certify that I have compared the foregoing copy with the original record now on file in my office, and containing summons, complaint, answer, bill of exceptions, opinion*ion* of the supreme court, judgment, etc., etc., and that it is a correct transcript therefrom and of the whole thereof, as the same remains on record in my office.

Seal of Circuit Court, Outagamie County, Wisconsin.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 28th day of May, A. D. 1888.

F. C. FRIEDRICHS, *Clerk.*

176 To the Hon. Orsamus Cole, chief justice of the supreme court of the State of Wisconsin:

Your petitioners, The Kaukauna Water Power Company, Bradner Smith and Company, James C. Delaney, Charles D. Cassed, David McCartney, James H. Elmore, Joseph Klein, Milwaukee, Lake Shore and Western Railway Company, Badger Paper Company, and B. Aymar Sands, as trustee, respectfully state that in a suit between the Green Bay and Mississippi Canal Company, plaintiff and appellant, and your petitioners above herein named, defendants and respondents, then pending upon appeal in the supreme court of the State of Wisconsin (being the highest court of the said State in which a decision could be had in said suit), on the 13th day of December, 1887, a final judgment was rendered in favor of said plaintiff, The Green Bay and Mississippi Canal Company, and against said defendants, your petitioners, among other things, reversing the judgment of the court below and forever enjoining and restraining your petitioners from drawing any water for hydraulic power from the pond maintained by the dam across Fox

river, in the city of Kaukauna, in the county of Outagamie and State of Wisconsin, mentioned in the complaint and judgment in said action, and also adjudging that the said plaintiff was and is the legal owner of all of the water power created by such dam over and above what is required for navigation, and in which said judgment of said supreme court of the State of Wisconsin it was also, pursuant to the statutes of the State of Wisconsin in such case made and provided, ordered and adjudged that its said judgment so rendered should be
177 remitted to the circuit court of said State of Wisconsin in and for the county of Outagamie, to be there entered of record and executed according to law; and your petitioners further state that the original record in said suit, which was sent up to said supreme court upon said appeal, together with a certified copy of the judgment of said supreme court and of the opinions of said supreme court filed upon the rendition of its said judgment, were remitted to, filed, and entered of record in the said circuit court for said county of Outagamie on or about the 2nd day of April, A. D. 1888, and that on the 9th day of May, 1888, during the April term of said circuit court and pursuant to direction of said supreme court, the final judgment in said suit was rendered and entered in and by said circuit court for said county of Outagamie in the language and pursuant to the direction of said supreme court, all of which more fully appears in and by the copy of the record of said suit, certified by the clerk of said circuit court for said county of Outagamie, now produced and submitted to your honor for inspection and examination; and your petitioners further state that in said suit and in the final judgment therein rendered there was drawn in question the validity of a statute of the State of Wisconsin and the validity of an authority exercised under the State of Wisconsin on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity, in which decision manifest error hath happened to the great damage of your petitioners, all of which appears in the record of said suit
178 and proceedings. Wherefore your petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the circuit court of the State of Wisconsin, for said county of Outagamie, to the end that such errors, if any there be, may be corrected.

Dated June 13th, 1888.

KAUKAUNA WATER POWER COMPANY,
BRADNER SMITH AND COMPANY,
JAMES C. DELANEY,
CHARLES D. CASSED,
DAVID McCARTNEY,
JAMES H. ELMORE,
JOSEPH KLEIN,
MILWAUKEE, LAKE SHORE AND WESTERN RAILWAY COMPANY,
BADGER PAPER COMPANY,
B. AYMAR SANDS, *Trustee,*
By ALFRED L. CARY, *Their Attorney.*

179 [Endorsed:] X'd. In circuit court, Outagamie county. Kaukauna Water Power Company *et al.*, defendants and petitioners, *ads.* Green Bay & Mississippi Canal Company, plaintiff. Petition for allowance of writ of error. Copy. The statements & allegations of the within petition found to be true and the prayer thereof is granted and writ of error allowed this 13th day of June, A. D. 1888. Orsamus Cole, chief justice of the supreme court of the State of Wisconsin. Filed June 18, 1888. F. C. Friedrichs, clerk.

180 Know all men by these presents that we, Joseph Vilas, of Manitowoc, Wisconsin, Frederick W. Rhinelander and Samuel S. Sands, of the city and State of New York, and Gordon Norrie, of said city of New York, are held and firmly bound unto the Green Bay and Mississippi Canal Company, a corporation organized and existing under the laws of the State of Wisconsin, in the full and just sum of thirty thousand dollars lawful money, to be paid to the said Green Bay and Mississippi Canal Company, its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirteenth day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a general term of the circuit court of the State of Wisconsin held in and for the county of Outagamie, in said State, on the 9th day of May, A. D. 1888, at the court-house in Appleton, in said county of Outagamie, a final judgment was rendered and entered in a suit depending in said court between The Green Bay and Mississippi Canal Company, plaintiff, and The Kaukauna Water Power Company, Bradner Smith and Company, James C. Delaney, Charles D. Cassed, David McCartney, James H. Elmore, Joseph Klein, Milwaukee, Lake Shore and Western Railway Company, Badger Paper Company, and B. Aymar Sands, as trustee, defendants, which said suit before then had been to the supreme court of the State of Wisconsin upon appeal by said plaintiff, and a final judgment rendered therein by said supreme court on the 13th day of December, 1887, in favor of
181 said plaintiff, which said judgment of the said supreme court was therein ordered and directed to be remitted to and entered in and by said circuit court for Outagamie county aforesaid; and whereas such final judgment so ordered as aforesaid by said supreme court of the State of Wisconsin was rendered against the said defendants above named and entered in said circuit court for Outagamie county on said 9th day of May, 1888, and the said defendants, Kaukauna Water Power Company, Bradner Smith & Company, James C. Delaney, Charles D. Cassed, David McCartney, James H. Elmore, Joseph Klein, Milwaukee, Lake Shore and Western Railway Company, Badger Paper Company, and B. Aymar Sands, as trustee, feeling aggrieved by said judgment and about to remove the same into the Supreme Court of the United States, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed

to the said plaintiff, Green Bay and Mississippi Canal Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next: Now, the condition of the above obligation is such that if the said defendants above named shall prosecute their writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JOSEPH VILAS. [SEAL.]
F. W. RHINELANDER. [SEAL.]
SAM'L S. SANDS. [SEAL.]
G. NORRIE. [SEAL.]

Sealed and delivered in presence of—.

BRADLEY G. SCHLEY,
As to Vilas and Rhinelander.
W. HENRY REESE,
As to S. S. Sands & G. Norrie.

182 [Endorsed:] X'd. Supreme Court of the United States. Kaukauna Water Power Company *et al.*, plaintiffs in error, *vs.* Green Bay & Mississippi Canal Company, defendant in error. Copy of bond on writ of error. I approve of the within bond and of the sufficiency of the sureties therein, and accept the same as good and sufficient securety upon the writ of error in above-entitled cause. June 13, 1888. Orsamus Cole, chief justice of the sup. c't of the State of Wisconsin. Filed June 18, 1888. F. C. Friedrichs, clerk.

183 In Supreme Court of the United States, of October Term, in the year of our Lord one thousand eight hundred and eighty-eight.

KAUKAUNA WATER POWER COMPANY, BRADNER, SMITH and Company, James C. Delaney, Charles D. Cassed, David McCartney, James H. Elmore, Joseph Klein, Milwaukee, Lake Shore and Western Railway Company, Badger Paper Company, and B. Aymar Sands, as Trustee, Plaintiffs in Error,
vs.
GREEN BAY AND MISSISSIPPI CANAL COMPANY, Defendant in Error. } In Error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said plaintiffs in error above named, by their attorneys, Alfred L. Cary and David S. Ordway, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. That the complaint aforesaid and the matters therein contained are not sufficient in law for the said Green Bay and Missis-

sippi Canal Company, defendant in error, to have or maintain its aforesaid action thereof against the said plaintiffs in error.

2nd. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was
184 given for the said defendant in error, said Green Bay and Mississippi Canal Company, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs in error against the said defendant in error.

3rd. There is also error in this, to wit: By and under said judgment of the supreme court of the State of Wisconsin the property of said plaintiffs in error is, under and by virtue of the act of the State of Wisconsin, approved August 8th, 1848, entitled "An act to provide for the improvement of the Fox and Wisconsin rivers, and connecting the same by a canal," as interpreted and enforced by said supreme court of the State of Wisconsin in its said judgment, taken for a private purpose, and said plaintiffs in error are thus and thereby deprived of their property without due process of law and contrary to the provisions of the fourteenth amendment of the Constitution of the United States.

4th. It was error for said supreme court of the State of Wisconsin to decide that that part of the said act of the State of Wisconsin, approved August 8th, 1848, which, as construed and interpreted by its said judgment, authorized and directed the taking of all of the water power created by reason of the so-called Government dam, mentioned in the complaint in said suit, over and above what thereof was necessary for the purpose of navigation, was valid and constitutional, and in thus holding that said act of the Legislature of the State of Wisconsin, as thus construed, was not repugnant to the provisions of the fourteenth amendment of the Constitution of the United States.

185 5th. It was also error for said supreme court of the State of Wisconsin to decide in and by its said judgment that the authority exercised under said State of Wisconsin, pursuant to the provisions of said act of 1848, in the taking of and which took and appropriated to the use or purposes of the State of Wisconsin all the water power of said Kaukauna Water Power Company at the place in question over and above what was necessary for the purposes of navigation, was valid and constitutional and not repugnant to the provisions of the Constitution of the United States or to the provisions of the fourteenth amendment thereof.

6th. There is also error in said judgment of the supreme court of the State of Wisconsin in holding and deciding that the said plaintiffs in error be perpetually enjoined from drawing any water for hydraulic power from the pond maintained by the dam across Fox river, in the city of Kaukauna, in the county of Outagamie and State of Wisconsin, resting (on the south side of said river) upon lot five of section twenty-two, south of the river, and upon fractional section twenty-four, on the north side of the river, in town. 21 north, of range 18 east, mentioned in the complaint, thereby deciding that the State of Wisconsin had lawful right under the provisions of the said act of the Legislature of 1848 to take and appropriate to private

purposes all of the water power upon or belonging to said lot (5) five over and above what is required for the purpose of navigation.

7th. There is also error in said judgment in this, to wit, that by the same it is adjudged that the said defendant in error is the
186 legal owner of all the water power created by said Government dam over and above what is required for navigation, thus and thereby deciding that the said water power upon said lot five, over and above the water necessary for navigation (which without said act of 1848 belonged to the said plaintiff in error, Kaukauna Water Power Company), was so taken for a public and not a private purpose; also thereby deciding that the authority by which the same was so taken was exercised under the State of Wisconsin pursuant to the provisions of said act of the Legislature, approved August 8th, 1848, and thereby also deciding that said act of the Legislature of 1848 and the authority so exercised under it were valid and not repugnant to the Constitution of the United States or the fourteenth amendment thereof.

8th. There is also error in this, to wit, that by the record aforesaid it is adjudged that the said act of the Legislature of the State of Wisconsin, approved August 8th, 1848, in so far as it authorized the taking of private property for public use, is valid and effectual for the transfer of title thereunder, although it contains no legal or valid provision for the making of compensation therefor to the owner of property so taken; and thereby deciding that the said State of Wisconsin did not enforce said act of 1848 to the depriving of the said plaintiffs in error of their property without due process of law.

9th. There is also error in this, to wit, that by the said final judgment the State of Wisconsin enforced the said act of 1848 so as to deprive the plaintiffs in error of their property without due process of law.

187 10th. There is also error in this, to wit, that by the said final judgment the State of Wisconsin enforced the said act of 1848 so as to deprive the said Kaukauna Water Power Company of its property, to wit, of the said water power or the use of its said water over and above what was necessary for the purposes of navigation, without due process of law, in that it is decided by said judgment that the State of Wisconsin became the owner of said surplus water power by virtue of the provisions of said act of August 8th, 1848, without making due or any compensation to the owner therefor.

11th. The supreme court below reversed the judgment of the circuit court, upon the ground, as stated in the opinion, that notwithstanding the act of August 8th, 1848, contained no provision for securing or making compensation to the owner for the water power so taken in excess of what was necessary for the purposes of navigation, yet that such owner had ample remedy or recourse therefor against the United States of America. In this decision there was error, for which the said judgment should be reversed; and the said plaintiffs in error pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and

that they may be restored to all things which they have lost by occasion of said judgment.

ALFRED L. CARY AND
DAVID S. ORDWAY,
Attorneys for Plaintiffs in Error.

188 [Endorsed:] In Supreme Court of the United States. Kaukauna Water Power Company *et al.*, plaintiffs in error, *vs.* Green Bay & Mississippi Canal Company, defendant in error. Assignments of error. Alfred L. Cary and David S. Ordway, att'ys for pl'ffs in error. Circuit court, Outagamie county. Filed Jul. 24, 1888. F. C. Friedrichs, clerk.

189 The United States of America to the "Green Bay and Mississippi Canal Company," Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the State of Wisconsin for the county of Outagamie, at the city of Appleton, in the State of Wisconsin, wherein Kaukauna Water Power Company, Bradner, Smith and Company, James C. Delaney, Charles D. Cassed, David McCartney, James H. Elmore, Joseph Klein, Milwaukee, Lake Shore and Western Railway Company, Badger Paper Company, and B. Aymar Sands, as trustee, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the final judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Orsamus Cole, chief justice of the supreme court of the State of Wisconsin, this 13th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

ORSAMUS COLE,
Chief Justice of the Supreme Court of Wisconsin.

190 [Endorsed:] X'd. Supreme Court of the United States. Kaukauna Water Power Company *et al.*, plaintiffs in error, *vs.* Green Bay and Mississippi Canal Company, defendant in error. Citation. I accept due and personal service upon me of the within citation; also of copy of writ of error and copy of supersedeas bond, this 14th day of June, 1888. Moses Hooper, attorney for said defendant in error, Green Bay and Mississippi Canal Company. Circuit court, Outagamie county. Filed June 18, 1888. F. C. Friedrichs, clerk.

On this — day of ——, in the year of our Lord one thousand eight hundred and eighty —, personally appeared —— —— before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the — ——, A. D. 188–.

—— ——.

191 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judge of the circuit court of the State of Wisconsin in and for the county of Outagamie and tenth judicial circuit of said State, Greeting:

[Seal of U. S. Circuit Court, Eastern District Wisconsin.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court for the county of Outagamie and State of Wisconsin, before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Green Bay and Mississippi Canal Company, plaintiff, and Kaukauna Water Power Company, Bradner, Smith and Company, James C. Delaney, Charles D. Cassed, David McCartney, James H. Elmore, Joseph Klein, Milwaukee, Lake Shore and Western Railway Company, Badger Paper Company, and B. Aymar Sands, as trustee, defendants, wherein was drawn in question the validity of a statute of and an authority exercised under said State on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their

192 validity, a manifest error hath happened, to the great damage of the said defendants above named, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Samuel F. Miller, senior associate justice of the said Supreme Court, the eighth day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

EDWARD KURTZ,
Clerk of the Circuit Court of the United States for the Eastern District of Wisconsin.

ALFRED L. CARY AND
DAVID S. ORDWAY,
Attorneys for Pl'ff's in Error.

Allowed by—

ORSAMUS COLE,
Chief Justice of the Supreme Court of Wisconsin.

June 13th, 1888.

14—701

193 [Endorsed:] X'd. Supreme Court of the United States. Kaukauna Water Power Company, Bradner, Smith and Company, James C. Delaney, Charles D. Cassed, David McCartney, James H. Elmore, Joseph Klein, Milwaukee, Lake Shore and Western Railway Company, Badger Paper Company, and B. Aymar Sands, as trustee, plaintiffs in error, *vs.* Green Bay and Mississippi Canal Company, defendant in error. Writ of error. Circuit court, Outagamie county. Filed Jun. 18, 1888. F. C. Friedrichs, clerk.

191 OFFICE OF THE CLERK OF THE CIRCUIT COURT,
OUTAGAMIE COUNTY, WISCONSIN.

I, F. C. Friederichs, clerk of the circuit court for said county of Outagamie and State of Wisconsin, do hereby, pursuant to the command of the annexed writ of error in the case of The Kaukauna Water Power Company and others, plaintiffs in error, and The Green Bay and Mississippi Canal Company, defendant in error, return thereto as follows, viz:

1. The said original writ of error, dated June 8th, 1888.

2. The original allowance thereof thereon endorsed, dated June 13, 1888.

3. The original citation, with proof of personal service thereof upon the attorney for said defendant in error on June 14, 1888.

4. The original assignment of errors filed in my office July 24th, 1888.

A true copy of record, including bill of complaint, answer, bill of exceptions, judgment, two opinions of the supreme court, and of all other proceedings in the case; and I do certify that I have compared the copies hereto annexed with the originals of which they purport to be copies, which originals are now in my said office and under my control, and that the annexed are true, full, and perfect copies of said originals and of the whole thereof and literal and correct transcripts therefrom.

Seal of Circuit Court, Outagamie County, Wisconsin.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my said office, in the city of Appleton and State of Wisconsin, this 24th day of July, A. D. 1888.

F. C. FRIEDRICHS,
Clerk of the Circuit Court of Outagamie County, Wisconsin.

Endorsed on cover: Wisconsin, Outagamie county circuit court. No. 701. The Kaukauna Water Power Company, Bradner Smith & Company, James C. Delaney, Charles D. Cassed, David McCartney, James H. Elmore, Joseph Klein, The Milwaukee, Lake Shore & Western Railway Company, The Badger Paper Company, and B. Aymar Sands, trustee, plaintiffs in error, *vs.* The Green Bay & Mississippi Canal Company. Filed August 2, 1888.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 65.

THE KAUKAUNA WATER POWER COMPANY, ET ALS.,
PLAINTIFFS IN ERROR,

vs.

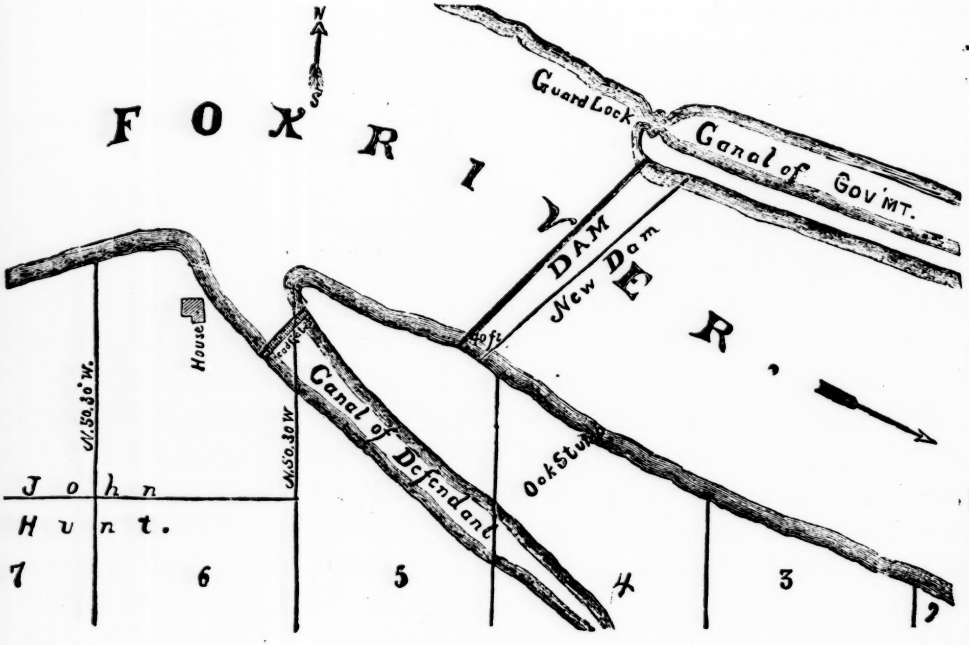
THE GREEN BAY AND MISSISSIPPI CANAL COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF OUTAGAMIE COUNTY, WISCONSIN.

BRIEF FOR PLAINTIFFS IN ERROR.

ALFRED L. CARY,
Counsel for Plaintiffs in Error.

BURDICK, ARMITAGE & ALLEN, PRINTERS, MILWAUKEE.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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 65.

THE KAUKAUNA WATER POWER COMPANY, ET ALS., PLAINTIFFS IN ERROR.

vs.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF OUTAGAMIE COUNTY, WISCONSIN.

BRIEF OF PLAINTIFFS IN ERROR.

For convenience the Kaukauna Water Power Company, the principal plaintiff in error (all others claiming under it), will be hereinafter designated as "Water Power Company," and the defendant in error will be designated as "Canal Company."

STATEMENT OF CASE.

The Fox river and Wisconsin river, in the State of Wisconsin, were in the year 1787, and ever since have been navigable waters, the Wisconsin river leading into the Mississippi river, and the Fox river leading into waters connected with the St. Lawrence river.

Congress, by act approved August 8, 1846, granted certain lands to the State of Wisconsin, on its admission into the Union, for the purpose of improving the navigation of the Fox and Wisconsin rivers, and constructing a canal to unite them, and by act approved June 29, 1848, the Legislature of Wisconsin assented to the act of Congress granting such lands.

Ever since Wisconsin has been a State, its constitution has contained the following provision (Section 10, Article 8):

> "The State shall never contract any debt for works of internal improvement, or be a party in carrying on such works, but whenever grants of land or other property shall have been made to the State, especially dedicated by the grant to particular works of internal improvement, the State may carry on such particular works, and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion."

That the Legislature of Wisconsin, by act entitled, "an act to provide for the improvement of the Fox and Wisconsin rivers, and connecting the same by a canal," approved August 8, 1848 (Laws of the State of Wisconsin, 1848, page 58), created a Board of Public Works to superintend the construction of the improvements contemplated by the act of Congress, and defined the powers of the Board, as well as the manner of disposing of the lands so granted. Sections 15 to 21 inclusive of said act are as follows:

> "SEC. 15. In the construction of such improvements the said board shall have power to enter on, to take possession of and use all lands, waters and materials, the appropriation of which for the use of such works of improvement shall in their judgment be necessary.
>
> "SEC. 16. When any land, waters or materials appropriated by the Board to the use of said improvements shall belong to the State, such lands, waters or materials, and so much of the adjoining land as may be valuable for hydraulic or commercial purposes, shall be absolutely reserved to the State, AND WHENEVER A WATER POWER SHALL BE CREATED BY REASON OF ANY DAM ERECTED OR OTHER IMPROVEMENTS MADE ON ANY OF SAID RIVERS, SUCH WATER POWER SHALL BELONG TO THE STATE, SUBJECT TO FUTURE ACTION OF THE LEGISLATURE.
>
> "SEC. 17. When any lands, waters or material appropriated by the board to the use of the public in the construction of said improvements shall not be freely given or granted to the State, or the said board cannot agree with the owner as to the

terms on which the same shall be granted the superintendent, under the directions of the board, shall select an appraiser, and the owner shall select another appraiser, who, together, if they are unable to agree, shall select a third neither of whom shall have any interest directly or indirectly in the subject matter, nor be of kin to such owner, and said appraisers, or a majority of them, shall proceed to hear testimony, and to assess the benefits or damages, as the case may be, to the said owner, from the appropriation of such land, water or materials, and their award shall be conclusive unless modified as herein provided. If the owner shall neglect or refuse to appoint an appraiser as herein directed, after ten days' notice of such appointment by the superintendent, then such superintendent shall make such appointment for him.

"SEC. 18. Either party may appeal from such award to the Circuit Court of the County in which the premises may be situated within thirty days after such award may be made and filed with the secretary of the board, and such appeal shall be tried by a jury as other cases commenced in said Circuit Court, and upon the finding of such jury judgment may be rendered in favor of either party, but no execution shall issue thereon against the State.

"SEC. 19. An entry of such award, signed by the appraisers, or a majority of them, or certified by the Clerk of the Court, in case the same shall have been appealed and containing a proper description of the premises appropriated, the names of the persons interested, and the sum estimated for benefits or damages, shall be made in a book, to be kept by the secretary of the board.

"SEC. 20. A transcript of such entry, signed in like manner, acknowledged or proved as a conveyance of land, shall be recorded in the office of the Register of Deeds of the County in which the premises are situated, and the fee simple of said premises shall thereupon vest in the State.

"SEC. 21. *If the damages exceed the benefits it shall be the duty of the board to direct the same to be paid out of the fund appropriated to said improvements;* proof of such payment or the offer thereof in case the party entitled shall de-

cline to receive the same, shall discharge the state and every person under its employ from any claim from such lands, waters and materials appropriated as aforesaid."

The Board were limited by the act in their contracts and expenditures to the proceeds derived from the sale of the lands granted by Congress and tolls derived from the improvement, and this was undoubtedly in compliance with said Sec 10, article 8, of the state constitution.

May 14th, 1851, the State made a contract with Morgan L. Martin, for the improvement of the Fox River, between Lake Winnebago and Green Bay. At Kaukauna, in township 21, north of range 18 east, were rapids in the Fox River, and the navigation at this point had to be improved by the construction of a dam across the river to secure slack water, and of a canal leading therefrom on the north side of the river to a point below the rapids.

Certain work was done by Martin under his said contract toward the improvement of the river prior to the organization of the Fox & Wisconsin Improvement Company, hereinafter mentioned, *but none at Kaukauna.*

In 1853, under chapter 98 of the general laws of Wisconsin for that year, the Fox & Wisconsin Improvement Company was organized and undertook the improvement of the navigation of the Fox and Wisconsin rivers, as contemplated by the said act of Congress, granting lands to the State. The State transferred to this company all of its rights and property in the contemplated improvement and in the lands granted by Congress, upon certain terms and conditions and authorized the company to go on and complete the improvement. The Improvement Company continued the contract made between the State and Martin, until 1855 or 1856, and Martin constructed the dam and canal at Kaukauna for the Improvement Company under that contract. He commenced getting out material for the construction of the dam in the fall of 1854, but did not enter upon the bed of the stream for its construction until 1855, and completed it that year. No work was done upon the south bank of the river, at this point, until the fall of 1854 or spring of 1855, and about the first thing to be done on this bank, was the making of the embankment hereinafter men-

tioned. (Record, p. 74.) The south end of the dam abutted upon government lot 5, in section 22, township 21, north of range 18 east. An embankment had to be constructed from this end of the dam up stream, along the margin of the river, upon lots 5, 6 and 7, of said section 22, to prevent the water raised by the dam from overflowing the adjacent land.

Said lot 5, which borders the river on its southerly side, was entered by one Garrit V. Denniston, from the United States, September 1st, 1835. He afterwards assigned his duplicate therefor to Joshua Hathaway, Jr., who received a patent from the United States dated August 10th, 1837, *which patent did not subject the land conveyed thereby to any easement in aid of the improvement of the river.* Hathaway's title to this land, through several mesne conveyances, became vested in the Water Power Company on the 14th of May, 1880, and it still holds said title to all that part of said lot lying northerly or northeasterly of the railroad track running near and parallel with the southerly bank of the canal, as shown upon the map of Ledyard, in the record, said Water Power Company's title covering all that part of said lot bordering upon and underneath said river. (Record, pp. 78, 79.)

The title to lots 6 and 7, sold by the United States September 1st, 1835, and patented August 10th, 1837, became and is now vested in the Water Power Company, subject to a certain release, given by one John Hunt to the Fox & Wisconsin Improvement Company (copy on page 20 of record); said lots adjoin lot 5 on its up stream side. (Record, p. 73.)

In the year 1866, pursuant to chapter 289 of the general laws of Wisconsin for 1861, the Canal Company was organized and became vested with all the property, rights, powers, privileges and franchises of the Fox & Wisconsin Improvement Company, under and by virtue of the foreclosure of a certain mortgage or trust deed given by said Improvement Company.

Congress by act entitled, "An act for the improvement of water communication between the Mississippi river and Lake Michigan, by the Wisconsin and Fox rivers," approved July 7, 1870, authorized the Secretary of War to ascertain at any time he should deem proper, within three years from the passage of said act the sum which ought, in justice, be paid to said Canal Company as an

equivalent for the transfer of all and singular its property and rights of property in and to the line of water communication between the Wisconsin river and the mouth of the Fox river, including its locks, dams, canals and franchises, or so much of the same as should, in the judgment of said Secretary, *be needed*, and to that end authorized said Secretary to join with said company in appointing a board of disinterested and impartial arbitrators, who, in making their award, were required by said act to take into consideration the amount of money realized from the sale of lands granted by Congress to the State of Wisconsin to aid in the construction of said water communication, which amount should be deducted from the actual value thereof as found by said arbitrators. (Record, p. 8.)

That the Legislature of Wisconsin, by chapter 416, Private and Local Laws, 1871, approved March 23, 1871, authorized and empowered said Canal Company to sell and dispose of its rights and property to the United States, as contemplated by said act of Congress. (Record p. 8.)

That pursuant to said act of Congress, a Board of Arbitrators was selected to appraise such property as therein provided, and that said board, by an award, dated November 15, 1871, determined the actual value of such property and rights of property of said Canal Company, in said line of water communication, including its locks, dams, canals, franchises and fixtures attending the operation and repair of the same to be $1,048,070, and that the amount of money realized from the sale of lands granted by Congress to aid in the construction of said line of water communication, to be deducted from such actual value, was $723,070, leaving a balance of $325,000 to be paid to said Canal Company for all such property.

They also appraised the value of said Canal Company's water powers, and lots necessary to the enjoyment of same, subject to to all rights to use the water for all purposes of navigation, at $140,000, and Canal Company's fixtures attending the operation and repair of the canal, being dredge-boats and other personal property, they appraised at $40,000, all of the same being parcel of the property valued at $1,048,070. (Record p. 8.)

The Secretary of War, by a communication dated March 8,

1872, reported the award of said arbitrators to Congress. (Record p. 72.)

We quote the following from his said report:

> "The Secretary approves of the award, as reported by said arbitrators, and he reports to Congress that $325,000 is the sum which, in his opinion, ought, in justice, to be paid to said corporation as an equivalent for the transfer to the United States of all the property, rights and franchises embraced in said award, provided Congress should determine to purchase the whole thereof.
>
> "The Secretary is of opinion that the personal property appraised by said arbitrators at $40,000, *is not needed for public use. He is further of opinion that the franchises of said corporation, that are appraised by said arbitrators, at the sum of $140,000, are not required for purposes of navigation, and are therefore not needed.* Deducting the above valuations of property, franchises, etc., which, in the opinion of the Secretary, are not "needed," within the meaning of that word, as used in said act, the valuation of the remaining property, franchises, etc., as found by said arbitrators, is $145,000. The secretary reports to Congress that all the property, franchises, etc., so valued at $145,000 are needed for purposes of navigation, *and that said amount of $145,000 is the sum which, in his opinion, ought in justice to be paid to said corporation as an equivalent for the transfer to the United States of said property, franchises, etc., so needed.*"

That thereupon Congress made an appropriation by Act approved January 10, 1872, for the purchase of all and singular the property and rights of property of said Canal Company reported by said Secretary of War to be needed, of $145,000, which sum was paid to said company on or about the 18th day of September, 1872, (record, p. 9,) whereupon, and in consideration whereof, said Canal Company conveyed to the United States of America, by deed bearing date September 18th, 1872, "all and singular its property and rights of prorerty in and to the line of water communication between the Wisconsin River aforesaid, and the mouth of the Fox River, *including its locks, dams, canals and franchises,* saving and

excepting therefrom and reserving to the said party of the first part (being said Canal Company) the following described property, rights, and portion of franchises, which, in the opinion of the Secretary of War and of Congress, are not needed for public use, to wit:

> "First. All of the personal property of the said company, and particularly all of such property described in the list or schedule attached to the report of said arbitrators, and now on file in the office of the Secretary of War, to which reference is here made whether or not such property be appurtenant to said line of water communication.
>
> "Second. Also all that part of the franchise of said company, viz: The water powers created by the dams and by the use of the surplus waters not required for the puspose of navigation, with the rights of protection and preservation appurtenant thereto, and lots, pieces, or parcels of land necessary to the enjoyment of the same, and those acquired with reference to the same, all subject to the right to use the water for all purposes of navigation." (For copy of deed, see record, pages 23-27.)

The said dam and other works of the improvement at Kaukauna, were included in such conveyance. The water powers and other property *excepted* by the Canal Company from this conveyance WERE SIMPLY NOT SOLD TO THE UNITED STATES, AND NO CONSIDERATION WHATEVER PASSED FROM THE UNITED STATES TO THE CANAL COMPANY THEREFOR OR IN RELATION THERETO, AND THE UNITED STATES MADE NO COVENANTS OR AGREEMENTS AND ASSUMED NO OBLIGATIONS OR BURDENS AS TO SAID *excepted* PROPERTY.

The United States, after such conveyance and about the year 1876 (Record, pp. 73 and 87) constructed a new dam across the river at Kaukauna upon a new location below said old dam, *the southerly end of which new dam was landed upon said lot 5 about 40 feet below the old dam, and the northerly end of said new dam was about 111 feet below the old dam.* (Record p. 62.) It also extended the embankment upon said lot 5 along the margin of the river on the south bank to the new dam. (Record p. 87.) After the construction of the new dam the old one was abandoned and suffered to go to decay. (Record pp. 66 and 87.)

NEITHER THE STATE OF WISCONSIN, THE FOX AND WISCONSIN IMPROVEMENT COMPANY, THE CANAL COMPANY NOR THE UNITED STATES EVER ACQUIRED ANY INTEREST IN OR TITLE TO ANY PORTION OF SAID LOT 5 BY CONDEMNATION PROCEEDINGS, OR BY PURCHASE OR GRANT FROM ANY of the owners of said lot. (See finding of Circuit Judge, record, page 48, and the finding of the State Supreme Court, record, page 86.)

Neither has either one of said parties acquired any rights or interests in any portion of said lot 5 by prescription. So the Supreme Court of Wisconsin found. (See opinion, p. 92, record.)

The Improvement Company never used more than ten per cent. of the water power created by the Kaukauna dam, and whatever it did use was on the north side (record, p. 56), and the Canal Company has never used one-half of the water power created by this dam, and whatever it has used has also been through the improvement canal on the north side of the river (record, p. 67). Neither of said companies ever owned any land upon the south side of the river upon which they could use any of the water power created by the Kaukauna dam.

In 1881 the Water Power Company (being the owner of all the land bordering the river on its southerly side from and including said lots 5, 6 and 7 to a point more than three thousand feet below said lot 5 and covering all the rapids of the river at this point), constructed a canal for hydraulic purposes upon its own land on the south side of the river at Kaukauna, and cut the same through said embankment upon said lots 5 and 6 (record, p. 88) for the purpose of drawing water from the pond or resevoir created by said dam, and has since the construction of said canal drawn water for hydraulic purposes from said pond. It also constructed in said canal near the point where it opens into said river, substantial bulkheads and head-gates, of sufficient height, depth and strength to retain the water in said river as effectually and to the same height that it was retained by said embankment along the margin of the river. Said defendant's canal is about 2,500 feet long and has a head of water for hydraulic purposes of 14 feet just below the headgates, increasing gradually to 24 feet at the lower end of the canal.

The Canal Company brought this action against the Water Power Company, and others claiming under it, in the Circuit Court

for Outagamie County, Wisconsin, to restrain them from drawing water from said pond through said canal, and incidentally to compel the Water Power Company to restore and rebuild the embankment which it had cut through and destroyed in reaching said pond with its canal.

It based its action upon the claim *that under the state it was the owner of and had the right to the exclusive use of all the hydraulic power created by the Kaukauna dam, subject only to the rights of navigation.*

The Water Power Company, on the contrary, claimed at the time it built its canal, and has always and does now claim *that as the owner of said lots 5, 6 and 7* (its title subject only to the public right of navigation, extending to the thread of the river under the uniform decisions of the highest court of the state), *it was also the owner of and had the right to use one half of the water of said river and the hydraulic power arising therefrom created by said dam, subject only to the rights of navigation.*

The Circuit Court, after a full hearing and trial, gave judgment for the defendants, dismissing the complaint upon the merits. From this judgment the Canal Company appealed to the Supreme Court of Wisconsin, which court, after a full hearing and argument of the case upon a record containing all of the testimony taken in the court below, reversed the judgment of the Circuit Court, and remanded the cause to that court, with directions to give judgment for the plaintiff, as indicated in the opinion of said Supreme Court. (Record pp. 83–93.)

(Case reported in 70 Wis. 635)

The remittitur from the Supreme Court of the state was filed in the Circuit Court, April 2, 1888 (Record pp. 82 and 83), pursuant to which and to said opinion judgment was entered by said Circuit Court perpetually enjoining and restraining the defendants from drawing any water from the pond maintained by the dam in question, and also adjudging the plaintiff to be the legal owner of the water power created by such dam over and above what is required for navigation. (Record pp. 96–98.)

The writ of error herein was sued out to bring said judgment up for review and correction.

SPECIFICATION OF ERRORS.

1. That the complaint aforesaid and the matters therein contained are not sufficient in law for the said Green Bay and Mississippi Canal Company, defendant in error, to have or maintain its aforesaid action thereof against the said plaintiffs in error.

2. There is also error in this, to-wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said defendant in error, said Green Bay and Mississippi Canal Company, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs in error against the said defendant in error.

3. There is also error in this, to-wit: By and under said judgment of the Supreme Court of the State of Wisconsin the property of said plaintiffs in error is, under and by virtue of the act of the State of Wisconsin, approved August 8, 1848, entitled, "An act to provide for the improvement of the Fox and Wisconsin rivers, and connecting the same by a canal," as interpreted and enforced by said Supreme Court of the State of Wisconsin in its said judgment, taken for a private purpose, and said plaintiffs in error are thus and thereby deprived of their property without due process of law, and contrary to the provisions of the fourteenth amendment of the Constitution of the United States.

4. It was error for said Supreme Court of the State of Wisconsin to decide that that part of the said act of the State of Wisconsin, approved August 8, 1848, which, as construed and interpreted by its said judgment, authorized and directed the taking of all of the water power created by reason of the so-called government dam, mentioned in the complaint in said suit, over and above what thereof was necessary for the purpose of navigation, was valid and constitutional, and in thus holding that said act of the Legislature of the State of Wisconsin, as thus construed, was not repugnant to the provisions of the Fourteenth amendment of the Constitution of the United States.

5. It was also error for said Supreme Court of the State of Wisconsin to decide in and by its said judgment that the authority exercised under said State of Wisconsin, pursuant to the provisions of said act of 1848, in the taking of and which took and appro-

priated to the use or purposes of the State of Wisconsin all the water power of said Kaukauna Water Power Company at the place in question over and above what was necessary for the purposes of navigation, was valid and constitutional and not repugnant to the provisions of the constitution of the United States, or to the provisions of the fourteenth amendment thereof.

6. There is also error in said judgment of the Supreme Court of the State of Wisconsin in holding and deciding that the said plaintiffs in error be perpetually enjoined from drawing any water for hydraulic power from the pond maintained by the dam across Fox river, in the city of Kaukauna, in the County of Outagamie and State of Wisconsin, resting (on the south side of the river) upon lot 5, of section 22, south of the river, and upon fractional section 24, on the north side of the river, in town 21 north, of range 18 east, mentioned in the complaint, thereby deciding that the State of Wisconsin had lawful right under the provisions of the said act of the Legislature of 1848, to take and appropriate to private purposes all of the water power upon or belonging to said lot (5) five, over and above what is required for the purpose of navigation.

7. There is also error in said judgment in this, to-wit: That by the same it is adjudged that the said defendant in error is the legal owner of all the water power created by said government dam over and above what is required for navigation, thus and thereby deciding that the said water power upon said lot five, over and above the water necessary for navigation (which without said act of 1848 belonged to the said plaintiff in error, Kaukauna Water Power Company), was so taken for a public and not a private purpose; also thereby deciding that the authority by which the same was so taken was exercised under the State of Wisconsin pursuant to the provisions of said act of the Legislature, approved August 8, 1848, and thereby also deciding that said act of the legislature of 1848, and the authority so exercised under it were valid and not repugnant to the constitution of the United States or the fourteenth amendment thereof.

8. There is also error in this, to-wit: That by the record aforesaid it is adjudged that the said act of the Legislature of the State of Wisconsin, approved August 8, 1848, in so far as it au-

thorized the taking of private property for public use, is valid and effectual for the transfer of title thereunder, although it contains no legal or valid provision for the making of compensation therefor to the owner of property so taken; and thereby deciding that the said State of Wisconsin did not enforce said act of 1848 to the depriving of the said plaintiffs in error of their property without process of law.

9. There is also error in this, to-wit: That by the said final judgment the State of Wisconsin enforced the said act of 1848 so as to deprive the plaintiffs in error of their property without due process of law.

10. There is also error in this, to-wit: That by the said final judgment the State of Wisconsin enforced the said act of 1848 so as to deprive the said Kaukauna Water Power Company of its property, to wit, of the said water power, or the use of its said water over and above what was necessary for the purposes of navigation, without due process of law, in that it is decided by said judgment that the State of Wisconsin became the owner of said surplus water power by virtue of the provisions of said act of August 8, 1848, without making due or any compensation to the owner therefor.

11. The Supreme Court below reversed the judgment of the Circuit Court upon the ground, as stated in the opinion, that notwithstanding the act of August 8th, 1848, contained no provision for securing or making compensation to the owner for the water power so taken in excess of what was necessary for the purposes of navigation, yet that such owner had ample remedy or recourse therefor against the United States of America. In this decision there was error, for which the said judgment should be reversed; and the said plaintiffs in error pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of said judgment. (Record, pp. 101-104).

JURISDICTION.

At the October term, 1889, of this court, the defendant in error moved the court to dismiss the writ of error herein for want of jurisdiction. Briefs were submitted by the respective parties for and against said motion, but the court postponed the consideration of such motion until the case was reached for hearing on the merits.

For convenient reference we will here reprint the substance of the brief which we submitted in opposition to the motion to dismiss.

As preliminary questions and for the purpose of showing what is properly a part of the record to be examined by this court in determining the question of its jurisdiction, we submit the following:

(*a.*) Under the constitution of Wisconsin, the Supreme Court of that state is required to try equity cases *de novo*, and to determine the questions of fact as well as of law where the record brings up all of the testimony submitted to the lower court. In such cases it is therefore quite immaterial as to what may have been the findings of the lower court upon the law and facts.

Catlin vs. Henton, 9 Wis. 476.
Felch vs. Lee, 15 Wis. 265.

We quote the following from the opinion of the court in the latter case at page 269:

> "We have frequently decided that in equity cases, the finding of facts by the court below was not conclusive, but that we would look into the testimony and determine what facts were established by it. This must be so, since the constitution gives this court appellate jurisdiction of cases at law and equity, *and by the well established rules of practice, the appellate court reviews the evidence in equity causes in the same manner as the court of original jurisdiction.* In common law cases the rule is otherwise."

On page 80 of record, and near the end of the bill of exceptions, we find the following as a portion of the certificate made by the trial judge of the lower court: "The foregoing is a true bill of ex-

ceptions in the foregoing entitled case, and contains all the evidence produced by either of the parties to said action."

The plaintiffs in error had no occasion to assign errors in the Supreme Court of Wisconsin, as the judgment of the court below was in their favor on the merits, and they did not take the appeal. It having been the duty of the State Supreme Court to try this case *de novo*, we may safely conclude that its opinion in the case is its finding of the facts and law. This point seems to fully answer and render inapplicable to this case all of the suggestions contained in the brief of counsel for defendant in error on motion to dismiss, from folios 18 to 23.

(b.) The decisions and opinions of the Supreme Court of Wisconsin are made a part of the record in the action or proceeding in which they are given by the statute. We quote section 2410 of the Revised Statutes of Wisconsin for 1878:

> "SEC. 2410. The Supreme Court shall give their decisions in all cases in writing, which shall be filed with the other papers in the case; and such decisions, and all decisions and opinions delivered by the court or any judge thereof, in relation, action or proceeding pending in said court, shall remain in the office of the clerk. *Every written opinion or decision of the Supreme Court, which shall have been filed with the clerk, shall constitute and be held a part of the record in the action or proceeding in which it shall have been given and filed, and shall be certified therewith to any court of the United States to which such action or proceeding, or the record thereof, may be in any manner certified or removed.* The state printer shall print for the use of the justices so many of such decisions and opinions, and at such times as shall be directed by them."

We also refer the court to sections 2411 and 3071 same revised statutes. Under these statutes and the following decisions of this court, the opinion of the Supreme Court of Wisconsin in this case is clearly a part of the record to be examined by this court in determining the question of its jurisdiction.

Delmas vs. Insurance Co. 14 Wall. 661-667.
Murdock vs. City of Memphis, 20 Wall. 590-633.

Gross vs. United States Mortgage Co. 108 U. S. 477.
Krieger vs. Shelby Railroad Co. 125 U. S. 39-44.
Kidd vs Pearson, 128 U. S. 1-15.

The judgment brought up for review on this writ of error, (and found on pages 96, 97 and 98 of record) in terms, makes the opinion of the Supreme Court a part of said judgment. The decision or remittitur from the Supreme Court is recited in the judgment, the latter part of which is as follows: "And that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to give judgment for the plaintiff, *as indicated in and by the opinion of this court*:" Then follows this recital: "And opinion of said Supreme Court being on file herein." And further on in the judgment we find the following: "Now, on motion of Moses Hooper, attorney for the plaintiff, *and pursuant to the said decision and opinion of said Supreme Court*, it is here by this court ordered and adjudged," etc.

The foregoing quotations are found on page 97 of record.

(c.) The constitution of the state of Wisconsin has always contained a provision, which, although different in form, is the same in legal effect as the "due process of law" clauses in the 5th and 14th amendments to the Constitution of the United States.

We refer to section 9, article 1 of said constitution, which is as follows:

> "SECTION 9. Every person is entitled to *a certain remedy* in the laws, for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay, *conformably to the laws*."

Article 2, of the ordinance of 1787, for the government of the territory of the United States northwest of the river Ohio, contained the following:

> "*No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land.*"

Section 12, of the Act of Congress, approved April 20, 1836, entitled "An act establishing the territorial government of Wiscon-

sin," 5 United States Statutes At Large, page 10, provided that the inhabitants of said territory should be entitled to and enjoy all and singular the rights, privileges and advantages granted and secured to the people of the territory of the United States northwest of the river Ohio, by the articles of the compact contained in the said ordinance of 1787, and should be subject to all the conditions, restrictions and prohibitions in said articles of compact imposed upon the people of said territory. It was therefore the law of the territory of Wisconsin, at the time of the adoption of the state constitution, that no man should be deprived of his liberty or property, but by the judgment of his peers or the law of the land.

The above section of the Wisconsin constitution has been construed by the Supreme Court of that state, and noticeably in *Durkee vs. city of Janesville*, 28 Wis. 464.

Osborn vs. Hart, 24 Wis. 89.
Taylor vs Porter, 4 Hill 140.
Cole vs. La Grange, 113 U. S. 1.
City of Janesville vs. Carpenter 77 Wis. 288-301.

Sec. 13, article 1, of the constitution of Wisconsin, is as follows:

"Section 13. *The property of no person shall be taken for public use without just compensation therefor.*"

FEDERAL QUESTION.

The federal question claimed is that plaintiffs in error have been deprived of their property without due process of law, by the State of Wisconsin, through the agency of its Supreme Court in giving effect to and enforcing a void statute of the State, in contravention of the fourteenth amendment to the Constitution of the United States.

The part of section 709 of the United States Revised Statutes, under which the jurisdiction of this court is asserted, is the following:

> "Or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity."

The statue of the state, the validity of which is drawn in question, is that part of section 16 of the act of August 8, 1848, providing for the improvement of the Fox and Wisconsin rivers, and connecting the same by a canal, which reads as follows:

> "*And whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water power shall belong to the state, subject to future action of the legislature.*"

Its invalidity was claimed upon two grounds:

First. That it purported to take private property for a private purpose, which is not only prohibited by the constitution of the State of Wisconsin, but also by a law which is higher and above all constitutions, and therefore that it was not *due process of law*, and,

Second. That if it was held to be the taking of private property for a public purpose, it was void under the constitution of the state, and not *due process of law*, because said act of 1848 did not, neither did any other act of the Legislature of Wisconsin, provide a way and means for ascertaining and making the compensation that should be paid for the property so taken.

The law that private property cannot be taken for private use, and also that it cannot be taken for public use, without just compensation, existed long before the adoption of the constitution of Wisconsin. It was and is the ancient and customary law of the people, necessarily attaching to the just distribution, ownership and enjoyment of property—in other words, it was and is the law of the land independent of the state constitution.

FEDERAL QUESTION WAS RAISED AND PRESENTED.

The following quotations from the Canal Company's complaint in this action, show that it based its alleged title to the water power in question upon said act of August 8, 1848, and especially upon that part of section 16, last above quoted.

Quotation from complaint, on page 2 of record:

> "That the State of Wisconsin, by an act approved August 8, 1848, undertook the improvement of the Fox and Wiscon-

sin rivers, and the sale of said lands and the application of the proceeds thereof to the use for which the same had been granted, and in said act provided for a Board of Public Works to superintend the completion of such improvement." "In said act the said State of Wisconsin provided that, 'whenever a water power shall be created by reason of any dam erected or other improvements made on any of the said rivers, such water power shall belong to the state, subject to the future action of the Legislature.' *By this act the State of Wisconsin appropriated to its own use and the use of its assigns and successors the water power of the said Fox river, which should thereafter be made available by dams erected in the business of improving said Fox river.*"

Quotation from complaint on page 3 of record:

"That said dam (meaning the dam in question), was built and maintained under the authority of said act of the State of Wisconsin, approved August 8, 1848, and amendatory acts providing for the completion of such improvement, and that there is no other authority for building or maintenance of the same."

Following certain allegations that the state had granted certain property to the Fox and Wisconsin Improvement Company, we find the following on page 4 of record:

"That among the property so passed to and vested in said Fox and Wisconsin Improvement Company were the said canals, locks and dam in town 21, range 18, and the hydraulic power furnished by said dam; that said dam and canals were then nearly completed. Also the following: "***That said dam furnished from the mill pond sustained by the same a large and very valuable hydraulic power, which is one of the powers mentioned in the act of the State of Wisconsin, approved August 8, 1848.***"

Hydraulic powers or *water powers* are not mentioned in said act of August 8, 1848, elsewhere than in said section 16, which fact in connection with the allegation of the complaint just quoted, clearly shows that the Canal Company in its said complaint based

its title to the water power in question upon the taking or appropriation of water power authorized by said section 16.

Referring again to complaint, then follow allegations that the said Fox and Wisconsin Improvement Company executed a mortgage to certain trustees upon all its rights, property and franchises, including its alleged title to the water power in question, and that through a foreclosure of said mortgage, the plaintiff became vested with all such property.

Quotation from complaint on page 9 of record:

> "That this plaintiff is the owner of and entitled to the exclusive use and control of the water power or hydraulic power supported and maintained and furnished by the above mentioned dam across Fox River, subject only to the right of the United States government to draw only so much water therefrom as is necessary to fill the canal on the north side of said river, leading from the pond above said dam to the river below said dam, for the purposes of navigation only, as specified in said conveyance from this plaintiff to the United States."

Quotations from the answer of the plaintiffs in error to said complaint:

Quotation from answer on page 16 of record:

> "And these defendants deny all that part of said complaint in folios 6 and 7 thereof, which is in these words: 'By this act the state of Wisconsin appropriated to its own use and the use of its assigns and successors the water power of the said Fox River, which should thereafter be made available by dams erected in the business of improving said Fox River; that such appropriation was necessary to secure the improvement of said rivers, and to prevent the application of the proceeds of the public lands granted as aforesaid from being expended upon dams which should furnish hydraulic power to private parties, owners of the lands bordering on the banks of said Fox River, and thus be substantially diverted from the use for which they had been granted."

Quotation from answer on page 17 of record:

> "And these defendants deny that all the hydraulic power furnished by the said dam so built in township 21, range 18,

passed to said Fox and Wisconsin Improvement Company by said transfer of 1853, or in any other way, and on the contary thereof, state, upon information and belief, that none of the hydraulic or water powers upon or appurtenant to the south or southerly shore, or bank of said river, and furnished by said dam, ever passed to or were owned by said Fox and Wisconsin Improvement Company."

Quotation from answer on page 19 of record:

"And these defendants deny that said plaintiff is, or, at the time of the commencement of this suit was, the owner of and entitled to the exclusive use and control of the water power or hydraulic power supported, maintained and furnished by the said dam, subject only to the rights of the United States Government, as stated at folio 46 in and of said complaint; *and they further deny that the plaintiff has or ever had title to or possession of said canal, dam and embankments for the purpose of using all surplus water drawn or to be drawn from said pond over and above the amount necessary for use in navigation.*"

"And these defendants state that the said plaintiff does not and never did own or have any interest in, as lessee or otherwise, any land or lots, vacant or otherwise, lying on the south or southerly bank, shore or side of said Fox river, in either of said lots 5, 6 or 7, or upon which it could use, on said south side of the river, any of said water so raised by said dam."

Quotation from answer on page 22 of record:

"*And these defendants deny that either the plaintiff, the Fox and Wisconsin Improvement Company, or the State of Wisconsin ever had or owned any water, right to water, or water power (except for the purpose of navigation), upon or along said Fox river, except as riparian owners;* AND THESE DEFENDANTS, UPON INFORMATION AND BELIEF, STATE THAT THE STATE OF WISCONSIN NEVER HAD AUTHORITY UNDER ITS CONSTITUTION TO ACQUIRE BY PURCHASE, CONDEMNATION OR OTHERWISE, OR TO ACCEPT OR RECEIVE TITLE TO ANY LAND OR WATER, OR WATER POWER ALONG OR UPON SAID FOX RIVER, EXCEPT FOR THE PURPOSES OF NAVIGATION; AND THAT IT NEVER

HAD ANY RIGHT, POWER OR AUTHORITY TO TAKE OR CONDEMN PRIVATE PROPERTY FOR THE PURPOSE OF MILLING OR MANUFACTURING OF ANY KIND, OR FOR THE PURPOSE OF TRANSFER OR SALE OR LEASE THEREOF TO OTHERS FOR ANY PURPOSE OTHER THAN NAVIGATION."

The Canal Company, having in its complaint based its alleged claim and title to the water power of the Fox river, and the alleged appropriation thereof by the State of Wisconsin to its own use and the use of its assigns and successors, upon section 16 of the act of 1848, and the plaintiffs in error having by their answer denied such appropriation, and also the alleged title and ownership of said water power by either the State, the Improvement Company or the Canal Company, the validity of said section 16 was thereby necessarily raised and drawn in question because there was no other foundation set up for said appropriation, title and ownership, than that given by said section 16.

It is true that the Canal Company claimed title to the water power in question on the trial by prescription, but the Supreme Court of the state has eliminated that question from consideration here by deciding that the claim of prescription was not well founded, or at least by declaring that it did not base its decision of the Canal Company's title upon any prescriptive right. We quote from the opinion of the State Supreme Court on page 92 of record:

"4. A prescriptive right to maintain the south half of the dam on lot 5, founded upon twenty years uninterrupted adverse user, is claimed on behalf of the plaintiff. Inasmuch as we are of the opinion that the United States has the legal right to maintain the dam on lot 5 without regard to any prescription, it is quite immaterial whether such claim is well founded or otherwise. *It probably is not well founded as to the additional embankment constructed from the old dam to the new dam; perhaps not as to the portion of the new dam on lot 5, which includes all of the structure south of the center of the stream.*"

It is also true that the Canal Company alleged in its complaint (record p. 10), that one Samuel Beardsley, the then owner in fee simple of said lot 5 at the time of the building of said dam, granted

to the state of Wisconsin, its successors and assigns, the right to build and forever maintain said dam and all necessary embankments to make the same useful and available on said lot 5, and that said Beardsley waived condemnation and appraisal of damages of his lands and riparian rights, parcel thereof and appurtenant thereto.

These allegations were all put in issue by the answer (record p. 20), and the Circuit Judge, upon such issue, found as follows:

> "There is no proof or pretense that any condemnation proceedings have actually been taken to acquire any rights on the south side of the river at this point by the State, the Fox and Wisconsin Improvement Company, the Green Bay and Mississippi Canal Company, or the United States, or that any conveyance has actually been had by either of them from anyone of any lands in lots 5, 6 or 7 aforesaid, except the deed from John Hunt" (record p. 48), and the Supreme Court found as follows:
>
> "No authority from the owner of lot 5 to erect or abut the dam upon that lot, or to build such embankment in front of it and no condemnation proceedings under the act of 1848 to obtain an appraisal of damages to such lot were proved on the trial." (Record p. 86.)

The question of the validity of said section 16, was clearly and expressly raised and presented by the last quotation above made from the answer of the plaintiffs in error on page 22 of record. By that part of their answer, the plaintiffs in error denied that the plaintiff, the Fox and Wisconsin Improvement Company, or the state, *ever had or owned any water, right to water, or water power (except for the purpose of navigation), upon or along said Fox river, except as riparian owners*, and they alleged:

1st. That the state never had authority *under its constitution* to acquire by purchase, condemnation or otherwise, or to acccept or receive title to any land or water, or water power along or upon said Fox river, except for the purposes of navigation, and—

2d. That the state never had any right, power or authority to take or condemn private property for the purposes of milling or

manufacturing of any kind, or for the purpose of transfer or sale, or lease thereof to others for any purpose other than navigation.

If these denials and allegations were true, then section 16 must have been unconstitutional and void, because as already said, that is the act by and through which the state attempted to appropriate the water powers of the Fox river, and by and through which the Canal Company claims title to such water powers.

It is not necessary to allege in express terms that section 16 was unconstitutional and void and not due process of law, and therefore that the taking of property under it was repugnant to the constitution of the United States. If such questions were raised by clear and necessary intendment, it is sufficient to sustain the jurisdiction of this court.

Wilson vs. Blackbird Creek Marsh Co., 2 Peters, 245–250.
Bridge Proprietors vs. Hoboken Co., 1 Wall. 116–142.
Chicago Life Insurance Co. vs. Needles, 113 U. S. 574–579.
Murray vs. Charleston, 96 U. S. 432–441, 442.
Furnam vs Nichol, 8 Wall. 44–56.

We have seen that the state and federal constitutions both alike declare in effect that no person shall be deprived of his property without due process of law; hence a statute repugnant to one in this respect would be repugnant to both, so that the plaintiffs in error, by questioning the authority of the state under its constitution, to take and appropriate water power upon the Fox river by virtue of section 16, also questioned such authority under the federal constitution.

Spencer vs. Merchant, 125 U. S. 345–352.

OPINION OF STATE SUPREME COURT.

It clearly appears from the opinion of the State Supreme Court that the federal question contended for was raised and presented to that court, and decided against the federal right. After stating the facts, the opinion starts out by saying in substance that the controlling question in the case was, had the Water Power Company the right to cut the embankment on lots 5 and 6 on the south side

of the river, and draw water from the pond made by the Kaukauna dam for hydraulic purposes, and then says:

> "The solution of this question requires the determination of several other questions, which will be stated and considered in their order."
>
> "*1. The claim of the plaintiff corporation to all the surplus water power created by the dam, is based upon the proposition that section 16 of the act of the Legislature, approved August 8, 1848, appropriates all such water power to the state. This proposition is disputed on behalf of the defendants.*" (Record page 88.)

Then follows a construction of section 16, holding that it covered the water power in question.

We further quote from the opinion on page 89 of record:

> "We conclude, therefore, that whatever right the state TOOK to the Kaukauna Water Power, by the act of 1848 (*which is the absolute ownership of the whole thereof if that is a valid act*), is vested in the plaintiff."

Allow us to say here in connection with this last quotation that the court must have decided section 16, of the act of 1848, to be valid, because they held in subdivision 5 of the opinion (record, page 92), *that the plaintiff was the legal owner of the water power created by such dam (meaning the Kaukauna dam), over and above what is required for navigation.*

We quote further from the opinion on page 89 of record:

> "2. It is further maintained on behalf of the defendants that conceding the Kaukauna water power is within the provision of section 16, of the act of 1848, such act is invalid as to the surplus of the water power over and above that required for the navigation of the river, *for the reason that it is taking private property for private use, which is beyond the power of the legislature.*"

This plainly states the first ground upon which it is claimed that section 16 was not due process of law, and that it was raised and presented.

The State Supreme Court held that the taking was incidentally

for a public use, but that decision does not affect the jurisdiction of this court, as this court will give the statute an independant construction in determining whether or not it is due process of law.

Yick Wo vs. Hopkins, 118 U. S. 356.

We again quote from the opinion on page 90 of record:

> "*3. It is further claimed on behalf of the defendants that by locating the south end of the dam upon lot 5, building an embankment thereon, and on lots 6 and 7, and appropriating the whole water power created by the dam; the state took the property of the owners of those lots, and that the laws of the state made no adequate provision for compensating them therefor.*"

Here is plainly stated the second ground upon which it is claimed that section 16 was not due process of law.

We further quote from the opinion on page 93 of record:

> "The case is a very important one, and any judgment finally entered in it may, probably will, be far reaching in its effect upon water rights on the Fox river. The writer ventures to express the opinion that there are federal questions involved in it which will support an appeal to the Supreme Court of the United States, and the desire that such an appeal may be taken to the end that the relative right of the plaintiff and other claimants to water power created by the improvement of the Fox river, now owned by the United States, may be finally determined by that tribunal."

We give this quotation as confirming the fact that federal questions were involved and had been raised and presented, and not as stating what they were.

NECESSARILY INVOLVED.

It appears from the record herein that the validity of section 16 was necessarily involved in the decision of the State Supreme Court, and that it could not have given the judgment which it passed without deciding in favor of such validity. The Canal

Company founded its right to the water power in question upon that act and no other, and it made no other claim of title except by prescription, which was decided against it.

Armstrong vs. Treasurer of Athens County, 16 Peters. 281–285.
Wilson vs. Blackbird Creek Marsh Co. 2 Peters, 245–250.
Chicago Life Insurance Co. vs. Needles, 113 U. S. 574–579.
Eureka Lake Co. vs. Uyba County, 116 U. S. 410.

FOURTEENTH AMENDMENT.

The counsel for defendant in error contends that because the state legislation drawn in question was enacted in 1848, therefore the fourteenth amendment to the Constitution of the United States, adopted in 1868, is inapplicable. The fourteenth amendment prohibits any state, through *any agency* whatever, whether legislative, executive, or judicial, from depriving any person of property without due process of law. It does not define what is due process of law, but whatever is not, it prohibits.

Section 16 of the act of 1848, was an assertion by the state of the right to arbitrarily take and appropriate private property for a private use, or perhaps for a public use, but in either case without compensation; at least, such was and is the contention of the plaintiffs in error. The record shows that no part of the water power in question had ever been *actually* taken, appropriated, or used by the state or its assigns prior to the commencement of this suit, therefore, section 16 as to such water power had remained a dead letter upon the statute book up to that time. The Canal Company found it necessary to invoke the authority of the state through the agency of its courts, to give effect to the statute of 1848, and this is the authority, exercised through such agency, to which the fourteenth amendment applies, and is also the authority drawn in question under the provisions of section 709 of the U. S. Revised Statutes, as well as the void statute enforced by such authority. If section 16 was void, and not due process of law according to the law of the land, then the judgment of the state court holding it valid and giving it effect, was also not due process of law, and was in violation of the fourteenth amendment.

In *Head vs. Amoskeag Manufacturing Co.*, 113 U. S. 9, the state statute drawn in question was approved July 3, 1868, twenty-five days prior to the adoption of the fourteenth amendment to the Federal Constitution.

Justice Gray, in delivering the opinion of the court in this case, says, at page 15:

> "The single question presented for decision is whether he (plaintiff in error) has been deprived of his property without due process of law in violation of the fourteenth amendment of the Constitution of the United States. It is only as bearing upon that question that this court, upon a writ of error to a state court, *has jurisdiction to consider whether the statute conforms to the constitution of the state.*"

Provident Institution vs. Jersey City, 113 U. S, 506, was a writ of error to the Court of Chancery, of the State of New Jersey, based upon an alleged violation of the *due process of law* clause of the fourteenth amendment. The state statute, there drawn in question, was passed May 25, 1852.

This court, in its opinion in *Strauder vs. West Virginia*, 100 U. S. 303, at page 310, uses the following language:

> "The fourteenth amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory, but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any state action that denies this immunity to a colored man, is in conflict with the constitution."

In *Virginia vs. Rives*, 100 U. S. 313, at page 318, we find the following in the opinion of the court:

> "It is doubtless true that a state may act through different agencies, either by its legislative, its executive, or its judicial authorities, and the prohibitions of the amendment (referring to the fourteenth amendment), extend to all action of the state, denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the 5th section of the fourteenth amendment, may enforce the

prohibitions whenever they are disregarded by either the legislative, the executive or the judicial department of the state. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition by removing the case from a state court, in which it is denied, into a federal court, where it will be acknowledged. Of this there can be no resonable doubt."

And in *Ex. parte Virginia*, 100 U. S. 339, we quote the following from the opinion of the court, at page 347:

"A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision therefore must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition, and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning."

Neal vs. Delaware, 103 U. S 370.

MERITS.

The errors assigned all converge to the one question: Was section 16 of the act of August 8, 1848, valid and sufficient to authorize the state to lawfully take and appropriate the water power in question, being parcel of the land bordering the Fox River on its southerly side, at Kaukauna, now owned by the Water Power Company, and especially of said lot 5 upon which the southerly end of the dam across the river at that point abuts?

I.

The Water Power Company's ownership of the land bordering the river on its southerly side extends to the thread or middle of

the stream and carries with it the right to use the water of the river for hydraulic and other purposes, subservient only to the uses of navigation. This is a property right incident to the ownership of the land.

It is established in Wisconsin by a long and unbroken line of decisions of its Supreme Court that the owner of the bank of a navigable stream takes to the thread of the stream with the right to use the water which flows over his land, subject only to the easement of navigation.

The first decision was *Jones vs. Pettibone*, 2 Wis. 308, which was made at the December term 1853 of the court. In this case it was held that the purchaser of land lying on the bank of a stream, when bounded by the stream, took to its center or thread; also that the United States in running meander lines along the margins of rivers, did it to determine the quantity of land, and not for the purpose of establishing boundary lines. This decision related back to at least the year 1842, when it appeared that one George Lurwick, the owner of the land in question was authorized by the Territorial Legislature of Wisconsin, to build a dam across the Oconto River. The decision was simply declaratory of what was the law of the land, and necessarily went back in effect to the time when the land was purchased from the United States, because there had been no new or additional grant, from either the state or United States, of the land in the bed of the river. The Supreme Court of the state had no power to make such grant or to legislate. It could only declare what was the existing law of the state. What was true of the Oconto River must have been true of the Fox River; for both were in the same jurisdiction and subject to the same laws. The legislature could not establish one rule and the Supreme Court of the state another for the ownership of the beds of navigable streams.

Jones vs. Pettibone, 2 Wis. 308.
Walker vs. Shepardson, 2 Wis. 384.
Walker vs. Shepardson, 4 Wis. 486.
Mariner vs. Schulte, 13 Wis. 693.
Arnold vs. Elmore, 16 Wis. 509.
Harrington vs. Edwards, 17 Wis. 586.
Yates vs. Judd, 18 Wis. 118.

Oleson vs. Merrill, 42 Wis. 203.
Delaplaine vs. R'y Co., 42 Wis. 214.
Weisbrod vs. R'y Co., 18 Wis. 35.
Heger vs. R'y Co., 26 Wis. 624.
Norcross vs. Griffiths, 65 Wis. 599.
Janesville vs Carpenter, 77 Wis. 288.
Chandos vs. Mack, 77 Wis. 573–577.

In the case of Walker vs. Shepardson, 4 Wis. 486, at page 508, the court says:

> "This court has decided that riparian owners who are bounded on a stream above the ebb and flow of the tide, own the land to the center or thread of the stream, and that, where the stream is navigable, the land covered by it is subject to the right of the public to the use of the stream as a public highway for the passage of vessels employed in its navigation; *but that for all other purposes the right of the riparian owner to the use of the land covered by the water is perfect.*"

In the *City of Janesville vs. Carpenter*, 77 Wis. 288, at page 300, the court says:

> "That Thomas Lappin, the owner in fee of this ground, has the right to use and enjoy it to the center of the river in any manner not injurious to others and subject to the public right of navigation, has been too often decided by this court and other courts to be questioned. As a riparian owner of the land adjacent to the water, he owns the bed of the river *usque ad filum aquae*, subject to the public easement if it be navigable in fact, and with due regard to the rights of other riparian proprietors. He may construct docks, landing place, piers and wharves out to navigable waters if the river is navigable in fact, and if it is not so navigable he may construct anything he pleases to the thread of the stream, unless it injures some other riparian proprietor or those having the superior right to use the waters for hydraulic purposes. * * * * * * * Subject to these restrictions, he has the right to use his land under water the same as above water. It is his private property under the protection of the constitution, and

it cannot be taken, or its value lessened or impaired, even for public use, "without compensation" or "without due process of law," and it cannot be taken at all for any one's *private* use.'

In *R. R. Co. vs. Schurmeir*, 7 Wallace 272, we find the following in the opinion of the court on page 286.

"Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser."

In this same case it was decided that proprietors of lands bordering upon navigable streams, in titles derived from the United States held only to the stream; but in the later case of *Barney vs. Keokuk*, 94 U. S. Reports, 324, this rule was modified. In the opinion in that case, on page 338, we find the following.

"Whether, as a rule of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several states themselves to determine. *If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.*"

In the case of *Norcross vs. Griffiths, supra*, the Supreme Court of Wisconsin, in referring to *R. R. Co. vs. Schurmeir* and *Barney vs. Keokuk*, uses the following language at page 628:

"The result of these decisions is that in this state the owner of the bank of a navigable stream, by purchase from the United States, is conclusively presumed to be the owner of the bed of the stream in front of his purchase to the middle or thread thereof; and under the same decisions the same presumption arises in favor of the owner of such bank in all cases, however such owner acquires his title; but the presumption in the case of owners not deriving their title directly from the government is not conclusive."

In *Packer vs. Bird* 137 U. S. 661 and in *Hardin vs. Jordan*, 140

U. S. 371, this court affirmed the rule which it laid down in *Barney vs. Keokuk, supra.*

Riparian proprietors, upon both navigable and non-navigable streams, in the absence of grant, license or prescription, are entitled to the use of water flowing upon their premises for any purpose to which it can be applied beneficially and without material injury to others' rights, limited as to navigable streams only by the superior public right of navigation. This right is inseperably annexed to the soil itself. It does not depend upon user or presumed grant from long acquiescense upon the part of other riparian proprietors above and below; but exists, *jure naturae*, as parcel of the land. It is not suspended or destroyed by mere non-user; although it may be extinguished by the adverse enjoyment of others. It is not affected by the use to which the water has been or may be applied. We cite a few of the many authorities relating to this subject:

Gould on waters, sections 204 to 209.

In 3 Kent's Com. (12th edition), at p. 439, we find the following:

"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate."

In *Cary vs. Daniels*, 8 Metcalf 466, at p. 480, Shaw, C. J. says:

"The right to the use of the water is inherent in the land, and in each parcel; but it is a right *publici juris*, and subject to the rules of the law securing to each successive proprietor the like use. If the owner of a large tract, through which a

water course passes, should sell parcels above and below his own land retained, each grantee would take his parcel with a full right, without special words, to the use of the water flowing on his own land as parcel, and subject to the right of all other riparian proprietors to have the water flow to and from such parcel. There is no occasion, therefore, for the grantor, in such case, to convey the right of water to the grantee, or reserve the right of water to himself, in express words; because, being inseparable from the land, and parcel of the estate, such right passes with that which is conveyed, and remains with that which is retained."

Merrifield vs. Worcester, 110 Mass. 216–219.
Tourtellot vs. Phelps, 4 Gray 370-376.
Pratt vs. Lamson, 2 Allen 275–284–287.
Tyler vs. Wilkinson, 4 Mason, 400.
Angell on Water Courses, Secs. 90–97.
Black River Imp. Co. vs. La Crosse Booming and Trans. Co. 54 Wis. 659–682.

The State Supreme Court in the case at bar held that the right of the owner of the land bordering the Fox river to utilize the waters of the river upon his land *was property*. We quote from the opinion of the court in this case (Record p. 90):

"He (referring to riparian owner) has the right, however, to pass from his land to the river and from the river to his land, and to utilize the waters of the river upon his land for any purpose not interfering with navigation of the stream or the rights of other riparian owners. *That the construction of the Kaukauna dam and improvement by the state and its appropriation of the water power thereby created, take the property of the owner of lot 5 and deprive him of his riparian rights just mentioned (which are also property) does not seem to admit of doubt or controversy.*"

II.

That part of section 16 of the act approved August 8, 1848 (laws of the State of Wisconsin, 1848, page 58), in the words following, to-wit: "And whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water power shall belong to the state, subject to future action of the legislature," was invalid, and hence not due process of law, for that it sought to authorize the taking of private property for private use.

It is unnecessary to cite authorities to show that it was beyond the power of the legislature to authorize such a taking for such a use. Our only inquiry need be as to whether the taking sought to be authorized was for a *private use*. The thing which the statute in question authorized to be taken was *water power*, which was not an essential part of the public thing being legislated upon, to-wit: the improvement of the navigation of the river.

The act also provided that such *water power should belong to the state, subject to future action of the legislature*.

This, we think, clearly implied that the state did not intend to use the water power in connection with and as a part of the public improvement, but did intend to dispose of it for *private* purposes.

This construction of the statute as to the water power in question is made more emphatic by the physical facts connected with the public improvement of the river at Kaukauna. None of the public improvements at this point touched the south side of the river, except the dam and the embankment leading therefrom along the margin of the river up stream.

The public canal, through which the water was to pass for the purposes of navigation, was upon the north side of the river.

The water power in question being appurtenant to the south shore could not well be used for any of the purposes of navigation established by the improvement, which were all located upon the north side, hence we say it is the more apparent that the state only sought to take and appropriate such water power for private use. It is a fact which will be undisputed, that ever since the dam at Kaukauna was first constructed, a large volume of the water of the river has poured over its crest and has gone to waste, and that

it was not only unnecessary for the purposes of navigation, but physically impossible to pass the whole volume of the river through the improvement canal on the north side. The water powers were not essential to the public use.

This is fully established by the finding of the Secretary of War that they were *not needed* in the purchase made by the United States from the Canal Company.

It is therefore fair to assume that the attempted appropriation thereof by the state was for a private use. The state could only appropriate so much of the water of the Fox river as was necessary for the public use, the use of the surplus remaining in the riparian owners. *Varick vs. Smith*, 5 Paige's Ch'y 137. Private rights could only be invaded to the extent necessary for the public use. This doctrine is expressly recognized in *Stevens Point Boom Co. vs. Riley*, 46 Wis. 237, and *Cohn vs. Wausau Boom Co.*, 47 Wis. 314. In the latter case, Ryan C. J. at p. 325, quotes the following from his opinion in the former case:

> "The private right of the riparian owner is subordinate to the public use of a navigable river, and is always exercised at the peril of obstructing navigation. This subjection of the private right to the public use may sometimes impair the private right or defeat it altogether. But the public right must always prevail over the private exercise of the private right."

By erecting the dam across the river to improve its navigation, the state did not thereby acquire the right to the use of all the water of the stream unless such use was necessary for the public purpose. If hydraulic powers were created by such dam the riparian owners would have the right to use the same if such use was not inconsistent and did not interfere with the public right of navigation. The power of eminent domain could rightfully be exercised to the extent necessary for the public purpose, but such power could not be exercised or delegated by the state to establish water powers for private purposes. Whatever of the waters of navigable streams are not required for public use, may be subjected to private use by the riparian owners, if such private use does not interfere with the public use.

The Supreme Court of Wisconsin, in the case at bar, held that under said section 16, the water powers were taken by the state for *public* and not for *private* use, and assigned as its principal reason for such holding that it was necessary for the state to have the entire and absolute control of the dam, embankments, canals, and all appliances necessary for the purposes of navigation, as well as of the waters in the pond created by the dam.

We quote from the opinion of the court at page 89:

> "It was necessary to erect the Kaukauna dam for the purpose of making the river at that point available for navigation. Without it, slack-water navigation would have been impossible. It was of vital interest, therefore, to the state that it or the corporation to which it entrusted the preservation and maintenance of the improvement should have the entire and absolute control of the dam, embankments, canals, and all appliances necessary for the purposes of navigation, as well as of the waters in the pond created by the dam. It would be a serious detriment to the public interest were each riparian owner entitled to cut the dam, or the embankment which is a part thereof, and draw water from the pond. The exercise of such a right might, and probably would, seriously interfere with the proper management of the improvement greatly to the detriment of the free and unrestricted navigation of the river. It was impossible to make the improvement in a proper manner, and to meet the requirements of navigation without creating some surplus water power, but for the reasons above suggested such surplus was merely incidental to the improvement."

The best answer that can be given to the above reasoning of the Supreme Court of Wisconsin, is the practical one supplied by the parties in interest. The ownership and control of all the water powers created by the public improvement of the Fox River (including the water power in question, if it ever in fact belonged to the state and consequently to the Canal Company) has been severed from the ownership of the works of improvement, and that, with the consent of the state and of the United States, the only powers having any possible control over the river for the purposes

of navigation. Congress authorized the purchase from the Canal Company of the works of improvement with or without the water powers, and the legislature of Wisconsin by chapter 416, Private & Local Laws, 1871, authorized the Canal Company to sell and dispose of its rights and property to the United States as contemplated by the Act of Congress.

Under the authority so given by the two legislative powers, the United States purchased the works of improvement only, and the Canal Company sold and conveyed only such works of improvement, retaining all water powers created thereby which it then owned. The Canal Company to-day claims all such water powers as its private property with the right to control them for its private uses, and also claims that the United States is bound to preserve and maintain such water powers for the private uses of such Canal Company. (Record p. 9.) We thus have a practical demonstration that such water powers were not incidental or essential to the public improvement, but on the other hand that they were taken and appropriated wholly for private use.

The Supreme Court of Wisconsin also based its decision that the water powers were not taken for private use upon two former decisions made by that court, one in *Attorney General vs. City of Eau Claire*, 37 Wis., 400, and the other in *State vs. Eau Claire*, 40 Wis. 533.

These cases were brought by the state against the city to enjoin it from erecting a dam across the Chippewa river which had been authorized by acts of the legislature. In the first case the legislative act involved was held void because it authorized the erection of a dam at public expense across a navigable river, either for the purpose of water works for the city, or for the purpose of leasing the water for private uses. Being optional for either the public or private purpose it was held void. The legislative act involved in the second case was held valid because it authorized the damming of the river for the public purpose of constructing water works for the use of the city. The language of the chief justice, who delivered the opinion in each of these cases, found at page 435, 37 Wis. and again repeated at pages 541 and 542, 40 Wis. would seem to imply that the excess of power produced by the dam erected

across a navigable river for the purpose of establishing water works for the city might be leased by the city; but no question of private right was involved or called in question in these cases; had there been, the language referred to would undoubtedly have been modified in reference to such right.

The preceding paragraph in the opinions implies this:

> "For that purpose (meaning the public water works for the city) the legislature could unquestionably grant and the city take the power to construct and maintain a dam not obstructing the navigation of a public river *or violating other right, public or private.*"

The Chief Justice referred to the case of *Spaulding vs. Lowell*, 21 Pick. 71, as supporting his intimation in the Eau Claire cases that the excess of power produced by the dam might be leased by the city.

Spaulding brought an action against the city of Lowell to recover back the amount of a tax which he had paid, and which had been assessed by the city upon him to aid in the building by the city of a market house, claiming mainly that the purpose for which the tax was raised was not a *public* one and therefore illegal, and, incidentally, that because an excess of room in the building as constructed, not required for market purposes, was leased by the city for other purposes, such leasing was an abuse of power and should defeat the tax. The court ruled against him upon both propositions, holding that the main object was the building of a market house, that the corporation was the proper judge of the fitness of the building for its objects, and that it was not competent in that suit to inquire whether the building was a larger and more expensive one than the exigencies of the city required.

If, in the case at bar, the question was whether the accidental surplus of water lawfully in the canal leading from the pond, created by the dam on the north side of the river, for the purposes of navigation, could be rightfully leased for water power purposes, then a question similar to that in *Spaulding vs. Lowell* would be presented.

The question under consideration in this case, it seems to us, is a very different one. It is whether the excess of water in the pond

formed by the dam and appurtenent to the south shore, and which is not necessary to, and cannot be taken into the canal for the purposes of navigation, can be claimed as an incidental part of the public improvement. The mere statement of the question shows that it is essentially different from the one presented in *Spaulding vs. Lowell.*

III.

Should it be determined that the taking of water power under said section 16 was for a *public use*, then we say, that such portion of said section was void under the constitution of the state, and not *due process of law*, because said act of 1848 did not, neither did any other act of the legislature of Wisconsin, provide a way and means for ascertaining and making the compensation that should be paid for the property so taken.

Section 13, Article 1, of the Constitution of the state of Wisconsin, is as follows:

> "The property of no person shall be taken for public use without just compensation therefor."

This provision was in force when the act of 1848 was enacted.

The sections of the act of 1848, relating to the subject of ascertaining and making compensation for property taken, being those numbered from 17 to 21, inclusive, are quoted at length in the statement portion of this brief.

In the case at bar, the Supreme Court of Wisconsin held that the act of 1848 made no adequate provision for compensating the owners of property taken for the improvement.

We quote from such opinion (Record p. 91):

> "The act of 1848 is certainly liable to the criticism that it makes no adequate provision for compensating the owners of property taken for the improvement." * * * * * * *
>
> "*But the act of 1848 failed to give the land owner the right to institute condemnation proceedings under it, to have his compensation determined;* and if the state should institute such proceedings, the compensation, when deter-

mined, was, by section 21 of the act, made payable out of the fund appropriated to such improvement." * * * * *

"The history of the improvement during the time it was in the hands of the Board of Public Works and of the Fox and Wisconsin Improvement Company, *shows that the improvement fund was a very uncertain source to rely upon for the payment of a debt charged upon it.* No other provision was made in the act of 1848, or in any other act of the legislature, for the condemnation of property to the use of the improvement, or for payment therefor. In view of these serious defects in the law, *and especially because the owner of the property taken for the purposes of the improvement was powerless to institute proceedings to have the compensation ascertained to which he was entitled,* Mr. Justice Orton said in *Sweaney vs. U. S.*, 62 Wis. 396, 22 N. W. Reporter 609, that until the act of Congress of 1875 there was no provision of law for the ascertainment and payment of the damages, and compensation for the taking of lands, by flowage or otherwise, for the use of the improvement. Looking to the practical operation of the statute, the statement thus made is substantially correct, although perhaps inaccurate in theory and form."

The same conclusion was reached by that court in *Sweaney vs. U. S.*, 62 Wis. 396, and in *Jones vs. U. S.* 48 Wis. 385-404, and by this Court in *Pumpelly vs. Green Bay Co.*, 13 Wall. 166-176.

The act of 1848 utterly failed to provide the means for the owner of private property to obtain the compensation required to be made under the constitutional provision above quoted. Under section 17 of the act, the initiative step in the proceedings to assess benefits or damages could only be taken by the superintendent of the board, under its directions; and the history of this case shows that no such action has been taken in reference to lot 5 for the space of more than thirty years. This feature of the act renders it invalid under the rule laid down in *Shepardson vs. R. R. Co.*, 6 Wis. 605, and in *Powers vs. Bears*, 12 Wis. 213. In the *Shepardson* case at page 613, the court says:

"For, although in this case provision is made for the

appraisal of the land taken, it is entirely at the option of the Company whether commissioners shall be appointed for that purpose or not. The owner of the land has, under the act of the legislature, no power to do any act which would have the effect to compel the Company to procure an appraisal of the land, or make payment therefor. He stands in the position of one whose property is taken from him without his consent, and who is without the power to compel payment. It was suggested by the counsel for the Company, that he could apply to the circuit court and procure a mandamus against the Company, to compel them to procure the appointment of commissioners to make the appraisal. Admitting that the court has the power to issue a writ of mandamus to compel a private corporation to perform a duty enjoined upon it by law, we still think that the owner of property which is taken for public use should not be compelled to resort to such a proceeding to obtain compensation. *The constitution provides that his property shall not be taken for such use without compensation, and it would in our opinion, be most grossly violated by compelling him to resort to a lawsuit in order to recover the value of the property taken.*"

Another radical defect in the law is that it provided (Sec. 21) that the damages should be paid out of the fund appropriated to said improvements. This fund was a very uncertain and inadeqate one, as experience proved, and was a trust-fund only, under control of the state. The state was liable for the expenses of the improvement only as trustee, and then only to the extent of the trust-funds in its hands. The act also provided that no execution should issue against the state upon any judgment that might be rendered.

Section 7 of the act incorporating the Fox and Wisconsin Improvement Company, chapter 98 of the General Laws of 1853, legislated the Board of Public Works, created by the act of 1848, out of existence. So that when the Improvement Company commenced the construction of the dam in question at Kaukauna in 1855, there was no Board of Public Works to set in motion the proceedings authorized by section 17 of the act of 1848; hence, there could not have been, at that time, any valid condemnation proceed-

ings instituted to obtain private property for the purposes of the Kaukauna dam. The Improvement Company, in the absence of any express provision of law authorizing it, could not say who should have the power in the place of the Board of Public Works to select the appraiser as provided in section 17.

Having established that there were no valid provisions of law in force by which compensation for private property, required for the purposes of the improvement of the Fox and Wisconsin rivers could be ascertained and obtained, it follows that there could be no lawful taking or appropriation by the state, or its successors, under the authority of section 16 of the act of 1848, or under any other authority, of any private property for the purposes of said improvement. Under the constitution the power to take was coupled with the right to have compensation made. The two went hand in hand; and the power to take could not be lawfully exercised unless the means for ascertaining and obtaining compensation at the time existed. We are fully sustained in this position by the uniform decisions of the Supreme Court of Wisconsin.

In *Norton vs. Peck*, 3 Wis. 714, the question was whether certain premises had been legally taken and appropriated by the town authorities for the purposes of a highway. The record did not show that any damages were awarded for the laying out of the highway. Chief Justice Whiton in delivering the opinion of the court says:

> "If our statutes make no provison for ascertaining and paying the damages which the owners of such property sustain by the taking of it for public uses, it rests with the legislature to supply the defect. *Unless some mode exists, we do not see how the property can lawfully be taken.* * * * * * * * We are compelled to hold the plea of justification bad, because it contained no averment that compensation was made to the plaintiff below for his land taken for the highway, and no averment that any proceedings were taken by the authorities of the town to ascertain the value of the land, so that he could receive it."

In *Shepardson vs. Railroad Co. supra*, at foot of page 612, the court says:

"We are of opinion that this act, so far as it attempts to authorize the taking and use of the land of individuals by the Company, without making any compensation, or providing any means by which compensation can be obtained by those whose property is taken, is repugnant to the section of our constitution above recited."

In *Robins vs. Railroad Co.*, 6 Wis. 636, at page 642, the court says:

"When the government *needs* my land it has the sovereign right to take it, and when it takes it by virtue of such sovereign right and power, it is bound by the constitution to pay me the value thereof *at the time it is taken.*"

In *Loop vs. Chamberlain*, 20 Wis. 135, at page 137, the court says:

"And although the railroad company has permanently appropriated the land of the plaintiff to its use, and are now and have been for years occupying it with a railroad track, and using it for the purposes of its road, yet it does not appear that any compensation has been made for the property thus taken, as required by the constitution and as contemplated by its charter. *Under these circumstances, there can be no doubt that neither the railroad company, nor any person acting under it, has any right to occupy the land or exercise acts of ownership over it. They are simply wrong doers, and must be considered as trespassers.*"

Again, in the same case, at page 138.

"The principle is well established in this state, and ought to be considered as settled, that neither a railroad company nor anyone acting under it, can enter upon a person's land and permanently occupy and appropriate it to the use of a railroad without making compensation therefor, or doing what in contemplation of law is deemed equivalent to making compensation—having the value of the property taken ascertained by commissioners, and tendering the amount to the owner. *Until this is done, the company acquires no right to exer-*

cise acts of ownership over the property or to use it for the purposes of its road."

In *Sherman vs. Railroad Co.*, 40 Wis. 645. Ryan. C. J. in delivering the opinion of the court, says:

"The case is governed by the constitution and statutes of this state, and the settled construction of them by this court. Upon open questions in this court we listen always with interest and often with instruction to the decisions of courts elsewhere, upon kindred questions. But when the rules of decision in this court are settled, we cannot disregard them because different rules may prevail elsewhere. There must always come a time when questions settled by the decisions of this court cease to be open here.

"Under the constitution of this state private property cannot be taken for public use *without just compensation first* made for it. *M. & M. Railroad Co. vs. Ebee*, 3 Pin. 334; *Norton vs. Peck*, 3 Wis. 714; *Shepardson vs. R. R. Co.*, 6 Id. 605; *Robins vs. Railroad Co.*, Id. 636; *Davis vs. Railroad Co.*, 12 Id. 16; *Powers vs. Bears*, Id. 214; *Loop vs. Chamberlain*, 17 Id. 504, 20 Id. 135; *Kennedy vs. Railroad Co.*, 22 Id. 581; *Bigelow vs. Railroad Co.*, 27 Id. 478; *Bohlman vs. G. B. & L. P. Railway Co.*, 30 Id. 105; *Bohlman vs. G. B. & M. Railway Co. Ante*, 157. This protection extends to an adjacent owner's fee in a common highway, against its use for the track of a railroad. *Ford vs. Railroad Co.*, 14 Wis. 609; *Pomeroy vs. Railroad Co*, 16 Id. 640; *Hegar vs. Railway Co.*, 26 Id. 624.

"*And a provision in the charter of a railroad company delegating the right of eminent domain, without providing for just compensation as a condition precedent to the use of private property, would be void under the constitution. Sheparason vs. Railroad Co.; Bigelow vs. Railway Co.; Bohlman vs. G. B. & L. P. Railway Co. supra.*

"*It was never the law in this state that a railroad company could permanently appropriate land to its use, leaving the owner to his own proceeding to obtain just compensation for it. Norton vs. Peck; Davis vs. Railroad Co.; Shepardson vs. Railroad Co.; Powers vs. Bears; Loop vs. Chamberlain, supra.*

> "The learned counsel for the respondent argued that the charter of his client authorized it to take land for its use, leaving the owner to his own remedy under it for compensation. If such were the true construction of the charter, it would obviously have been so far void."

Section 16 of the act of 1848 did not of itself divest the title to any private property, and could not until compensation was first made, as provided by the constitution.

San Francisco vs. Scott, 4 Cal. 114.

Consistent with the rules laid down in the foregoing cases, it has also been held by the Wisconsin Supreme Court that where private property was sought to be taken for a public use, without just compensation being first made or provided for, the owner had his remedy either in ejectment, trespass, or by injunction.

Sherman vs. Railroad Co. 40 Wis. 645.
Gilman vs. Railroad Co. 40 Wis. 643.
Blesch vs. Railway Co. 43 Wis. 183.
Weisbrod vs. Railway Co., 21 Wis. 602.
Hegar vs. Railway Co., 26 Wis. 624.
McVey vs. Railway Co., 42 Wis. 532.

It is true that in nearly, if not quite all the cases which we have cited, the right of eminent domain was sought to be exercised in behalf of railroad companies; but the rule as to compensation, as fixed by the constitution, is a universal one and applies whenever there is an attempted exercise of the power, whether in behalf of public or private corporations, or of individuals, if such a thing is possible. It must be borne in mind, however, that the Fox and Wisconsin Improvement Company and the Canal Company were both private corporations, and that it was not until after the state had placed the improvement of the rivers in question in the hands of the Improvement Company that there was any actual entering upon and taking of private property for the purposes of the improvement at Kaukauna. Hence, it must be held that the question here stands upon the same footing that it does in the cases

cited, and, as it would, had the attempted taking been in behalf of a railroad company.

We think it must now clearly appear to the court that at and prior to the time of the conveyance made by the Canal Company to the United States, there had not and could not have been any lawful taking or appropriation by the state, or its successors, the Improvement Company and Canal Company, of any part of lot 5, or the water power or riparian rights, parcel thereof. Such lawful taking or appropriation, during such time, was impossible, because no lawful means existed for ascertaining or making the just compensation required by the constitution. And such compensation was not, and in fact never has been made. The Canal Company, at the time it made its conveyance to the United States, was but a trespasser as to lot 5, and had no right or title whatever thereto or to the water power, parcel thereof. Having no title, it conveyed none to the United States, and could not except or reserve any to itself, and by such conveyance it deprived itself of the power to thereafter acquire by eminent domain any title to or interest in lot 5, or the water power, parcel thereof, because it had wholly parted with the public improvement and all powers incident thereto.

Had the owner of lot 5 brought ejectment, Canal Company would have been ousted, because it had no title and no compulsory means of acquiring title. It seems to us that these conclusions are as definitely reached as though it were the solution of a mathematical question.

The deed given by Canal Company to the United States was but a quit-claim, and contains no covenants whatever on the part of the grantor, and there are no covenants therein which can be construed as running from the grantee to the grantor as to the property excepted by the grantor.

It therefore follows that the government is not bound to make good any defect in or want of title to any of the property excepted by the Canal Company in its deed to the government.

If the Canal Company had acquired no title to the water power, parcel of lot 5, at the time of its conveyance to the government, the government is not now bound to supply such title; and, as we have already said, the Canal Company has lost its power to

acquire such title through eminent domain by having parted with the public improvement.

The Supreme Court of Wisconsin held that the owner of lot 5 had never been compensated for the water power, parcel thereof, neither had he released his right to such compensation. (Record p. 90). It also held that the United States (record p. 92), had assumed the payment of such compensation and had supplied the means of ascertaining the same by Act of Congress entitled "An act to aid in the improvement of the Fox and Wisconsin Rivers, in the State of Wisconsin," approved March 3, 1875, being chapter 166 of the Statutes, Second Session of the 43d Congress.

We quote the first section of the act:

> "That whenever, in the prosecution and maintenance of the improvement of the Wisconsin and Fox Rivers in the state of Wisconsin, it becomes necessary or proper in the judgment of the Secretary of War to take possession of any lands, or the right-of-way over any lands, for canals and cut-offs, or to use any earth, qaarries, or other material lying adjacent or near to the line of said improvement and needful for its prosecution or maintenance, the officers in charge of said works may, in the name of the United States, take possession of and use the same, after first having paid or secured to be paid the value thereof, which may have been ascertained in the mode provided by the laws of the state wherein such property lies. *In case any lands or other property is now or shall be* FLOWED OR INJURED by means of any part of the works of said improvement heretofore or hereafter constructed for which compensation is now or shall become legally owing, *and in the opinion of the officer in charge it is not prudent that* THE DAM OR DAMS BE LOWERED, the amount of such compensation may be ascertained in like manner. The department of justice shall represent the interests of the United States in legal proceedings under this act, and for flowage damages hereinbefore occasioned."

We think that these conclusions, viz.: that the United States had assumed payment of such compensation, and had also supplied the means of ascertaining the same, were erroneous. There

was nothing in the contract of purchase made between the government and the Canal Company, by which the government was bound to pay anything for, or on account of the property which it did not take, and which was excepted in the deed. The water powers created by the Kaukauna dam, and by the use of the surplus water not required for the purposes of navigation, are a part of the *excepted* property which the government did not purchase. Whatever title the Canal Company had to such water powers and such surplus water at the time of its said conveyance it kept, and nothing more. If its title was defective, or it had none, the government was in no wise bound to make the same good or supply it. To compel the government to now pay for the water power, parcel of lot 5, for Canal Company's benefit, would require it to make a payment which it never agreed or assumed to make, and for property that it had no title to or interest in. It would be nothing more nor less than a *forced* addition to the consideration which it agreed to and did pay for the property that it actually purchased. The Canal Company might as well call upon the government to pay mortgage liens or other claims upon the excepted property in the deed, as to make compensation for this water power, parcel of lot 5. If one of Canal Company's water power lots on the north side of the river at Kaukauna had been subject to a mortgage lien at the time it was excepted from such company's conveyance to the government, will it be contended that by the terms of the contract of purchase made by the government it was bound to pay such mortgage lien? We think not. Such payment would clearly be outside of and in addition to the consideration which the government agreed to pay for the property it purchased, and so would the compensation for the water power, parcel of lot 5, if the government should be compelled to pay it.

What the government did assume to pay by the act of March 3, 1875, was for damages and injuries growing out of and directly connected with the property conveyed to it by the Canal Company and not those relating to the property which said Company did not convey and did except in its deed, This satisfactorily appears from the opinion of the court in *U. S vs. Jones*, 109 U. S. 513, at pages 514 and 515.

We quote as follows:

"The arbitrators, in making their award, proceeded upon the principle that the United States should pay for the works what their construction had cost the state, and the companies succeeding to its interests, after making a reasonable abatement for wear and decay, and deducting the amount obtained from the sale of the ceded lands. *Some of the dams constructed had caused the lands of several parties to be overflowed, and in the estimate of the amount to be paid by the United States no account was taken of the liability of the Company for such damages. The question, therefore, soon arose whether the payment of these damages devolved upon the United States;* and this question was submitted by the committee on commerce, of the House of Representatives, to the Secretary of War, and by him was referred to the assistant judge advocate-general. *That officer held that liability for the damages incurred from the flowage of water on the lands of others, caused by the works constructed, followed the property transferred, and devolved on the United States. Upon this opinion a bill was prepared for the assumption by them of the Company's habiity for such damages, which was passed by Congress and approved on the 3rd of March, 1875.*"

We think it also satisfactorily appears from the same opinion and from the Act of Congress itself, that the government did not thereby assume to pay for any water powers or for supplying any defects in title to the water powers which the Canal Company did not convey to the government. The bargain between the Canal Company and the government was simply this: The government agreed to pay the sum of $145,000 (and this is the consideration named in the deed) for a conveyance to it of whatever title the Canal Company had to certain specified property, or in other words, for a quit-claim by Canal Company of such property, and it took the property subject to all the imperfections of Canal Company's title and also subject to all lawful burdens resting upon it, principal among which were the "flowage damages" mentioned in the act of March 3, 1875. And it was with the view of having these dam-

ages adjusted, and to authorize the government to acquire such other property in the future as it might need for the purposes of the improvement that Congress enacted the law of March 3, 1875, but, as to the property which Canal Company excepted in its deed, the government simply said that it was *not needed* and that it did not desire to purchase it upon any terms whatever, and therefore it was excepted from the conveyance and the government assumed no burdens and made no covenants or agreements in relation to it

The Act of Congress of March 3, 1875, was repealed on the first day of February, 1888 (25 U. S. Statutes At Large, page 21), which repeal, if the decision of the State Supreme Court is to stand, took away the only means of obtaining compensation for Water Power Company's property and completed the *confiscation* of such property.

It is competent for this court to consider in this case whether the act of August 8, 1848, conformed to the state constitution in the matter of ascertaining and making just compensation for private property taken for public use, *in determining the question as to what is due process of law, and whether or not there has been a violation of the fourteenth amendment.*

It is so held by this court in *Head vs. Amoskeag Manufacturing Co.*, 113 U. S. 9.

While the court may, yet it is not necessary that it should apply the test of the state constitution in determining whether or not the act of 1848 is *due process of law.* It is beyond the power of the state to take my property for a public purpose ***without just compensation*** even in the absence of any express constitutional limitation in that behalf. As we have already said, "the law that private property cannot be taken for private use, and also ***that it cannot be taken for public use, without just compensation,*** existed long before the adoption of the constitution of Wisconsin. It was and is the ancient and customary law of the people, necessarily attaching to the just distribution, ownership and enjoyment of property—in other words, it was and is the law of the land independent of the state constitution."

Calder vs. Bull, 3 Dall. 386–388.
Wilkinson vs. Leland, 2 Peters 627–657 and 658.
Durkee vs. Janesville, 28 Wis. 464–467.

City of Janesville vs. Carpenter, 77 Wis. 288 302 and 303.
Taylor vs. Porter, 4 Hill 140.
Powers vs. Bergen, 2 Selden 358.
Raleigh and Gaston R. R. Co., vs. Davis, 2 Dev. & Batt (N. C. Rep.) 451.
Hatch vs. R. R. Co., 25 Vt. 49-66.

We respectfully submit upon the foregoing considerations that the plaintiffs in error have been deprived of their property without due process of law, by the State of Wisconsin, through the agency of its Supreme Court in giving effect to and enforcing a void statute of the state, viz.: Section 16 of the act of August 8, 1848, and in violation of the fourteenth amendment of the Constitution of the United States.

ALFRED L. CARY,
Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 65.

THE KAUKAUNA WATER POWER COMPANY, ET ALS.,
PLAINTIFFS IN ERROR,

vs.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF OUTAGAMIE COUNTY, WISCONSIN.

BRIEF FOR PLAINTIFFS IN ERROR.

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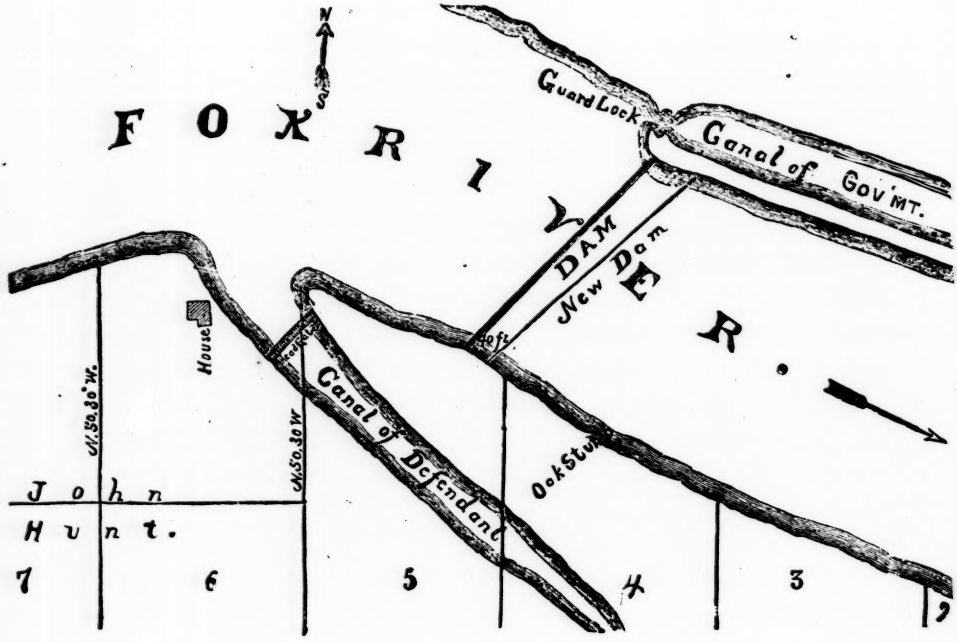
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FOX RIVER
Guard Lock
Canal of Gov'mt.
DAM
New Dam
Canal of Defendant
House
Oak Stump
John Hunt.
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IN ERROR TO THE CIRCUIT COURT OF WISCONSIN FOR THE COUNTY OF OUTAGAMIE.

MAY IT PLEASE YOUR HONORS:

Because of the full statement of the case made in the brief of my associate, I shall assume that it is unnecessary to repeat in detail what is therein contained, and will confine myself to a general statement of such parts of the pleadings as involve the supposed federal question brought up for review, but will, for convenience, print the findings of fact as stated by the State Supreme Court, with its opinion in full.

COMPLAINT.

The complaint (pages 1 to 13, record), may be said to contain three grounds of action:

First, based upon the act of the State of Wisconsin of August 8th, 1848, Laws of the *State* for 1848, page 58.

Second, upon alleged grants—from Beardsley, as to lot 5, and from Hunt, as to lots 6 and 7 (page 10, record.)

Third, upon or under the statute of limitations.

As the court below placed its decision wholly upon the first ground above stated, I shall endeavor to refer only to such portions of the pleadings as bear upon that issue.

At pages 1 to 3 of the printed record it is alleged (*inter alia*) that the Fox River, in the year 1787, was and still is one of the navigable rivers of the Northwest; has an average flow of over 150,000 cubic feet per minute, and affords a water power of over 300 horse power per foot fall. That there existed therein, at the place in question, rapids and falls – that dams and canals were requisite in order to secure slack water navigation thereof. That Congress, in 1846, granted lands in aid thereof; that in 1848, Wisconsin, upon its admission into the union, accepted the grant, and on the 8th day of August, 1848, passed the Act in question, and, therein provided for a board of public works to superintend the completion of such improvement. That in and by said act the state provided that, "Whenever a water power shall be created by reason of any dam or other improvement made on any of said rivers, such water power shall belong to the state, subject to the future action of the legislature."

At page 2 it is further alleged, "By this act, the State of Wisconsin appropriated to its own use, and to the use of its assigns and successors, the water power of said Fox River, which should thereafter be made available by dams erected in the business of improving said Fox River. * * * That said water powers were and are of great value, and that the value thereof has been expended in improving the navigation of said rivers within the intention of said Act of Congress."

It was then alleged that one of such rapids was located at the premises in question; that, in the prosecution of the improvement, the State of Wisconsin, between the 8th of August, 1848, and 6th of July, 1853, constructed a dam at the head of said rapids, so as to raise the water upwards of eight feet above natural level, the dam reaching from lot five (5), section twenty-two (22) south of the river, to section twenty-four (24) north of the river, and did build the canal and locks on the north side of the river, reaching from the pond created by said dam to the slack water of said river below the rapids and below said dam.

On page 3 is found the following allegation: "That said dam was built and maintained under the authority of the said Act of the State of Wisconsin, approved August 8th, 1848, and amendatory acts, providing for the completion of such improvement, *and*

that there is no other authority for building or maintenance of the same."

The complaint then proceeds (from the middle of page 3 of record to about the middle of page 4), to show the insufficiency of the fund provided for the improvement, and the embarrassment of the state, trustee; the creation, in the year 1853, of a private corporation, to-wit, the Fox and Wisconsin Improvement Company, by which the undertaking should be completed, and a transfer by the state to such corporation of all of the works and property of the improvement, among which was the dam, canal and works, at the point in question.

Thence on from about the middle of page 5 to the foot of page 7, is stated, as a link in the chain of title, a mortgage of the "Improvement" by the Fox and Wisconsin Improvement Company to trustees; default of the company—foreclosure of the mortgage,—sale thereunder, and conveyance to the defendant in error, (*The Green Bay and Mississippi Canal Company*), of all of said mortgaged property.

At pages 8 and 9 is stated the legislation of this state and of Congress, whereby the defendant in error was enabled to and did sell and transfer to the United States, this waterway, excepting from such conveyance its personal property, its water power lots, and such water powers as it owned, claiming *this* water power as one of those excepted.

On page 9 are the following allegations: "That the United States, has the use and control of said canal, dam and embankments appurtenant, and of the water furnished thereby for the purpose of navigation only, and this plantiff has the right to, and exclusive use of same, and has title to and possession of same, for the purpose of using all surplus water drawn, and to be drawn, from said mill pond, over and above the amount necessary for use in navigation. * * * * * *

That the use of said surplus water drawn, and to be drawn, from said mill pond, is of great value to this plantiff, to-wit, of the value of $100,000, to be used on plantiff's lots aforesaid, and on such other lands and lots as plantiff may purchase, or as plaintiff may lease water to be used upon."

At page 10 it is alleged that said Beardsley, then being the

owner of lot 5, "at the time of the building of said dam *granted* to the State of Wisconsin, and its assigns and sucessors, the right to build and forever maintain said dam and all necessary embankments, to make the same useful and available on said lot 5—that said Beardsley *waived* condemnation and appraisal of damages of his lands and riparian rights parcel thereof and appurtenant thereto."

At pages 12 and 13, is set forth more at length the origin of the title of the plaintiff in error, the location of its property skirting the river on the south—its chain of title through Beardsley and Hunt: that it has constructed its canal upon its own land in order to draw, and that it has drawn and is drawing water through the same for hydraulic purposes, ending with prayer, *inter alia*, for a perpetual injunction restraining the plaintiff in error from drawing water from said pond for any purposes, except for ordinary use for agriculture.

ANSWER.

The answer of the plantiffs in error does not deny the existence of the Act of 1848, but does deny that either for a public or private purpose, the act was effectual to transfer the property of the defendants below to the state. It denies the power of the state, by such an act to transfer the property of one party to another.

At page 17 of the record, the denial is in these words:

"And these defendants deny that all the hydraulic power furnished by the said dam * * * passed to said Fox and Wisconsin Improvement Company, by said transfer of 1853, or in any other way, and, on the contrary thereof, state, upon information and belief, that none of the hydraulic or water powers upon or appurtenant to the south or southerly shore or bank of said river, and furnished by said dam, ever passed to, or were owned by, said Fox and Wisconsin Improvement Company."

At page 20, defendants deny any purchase or condemnation of any part of lot 5.

At page 22 the denials are in the following words: "And these defendants deny that either the plaintiff, the Fox and Wisconsin Improvement Company, or the State of Wisconsin, ever had or

owned any water, right to water, or water power, except for the purpose of navigation upon or along said Fox river, except as riparian owners; and these defendants, upon information and belief, state that the State of Wisconsin never had authority, under its constitution, to acquire, by purchase, condemnation, or otherwise, or to accept or receive title to any land or water or water power along or upon said Fox River, except for the purpose of navigation, and that it never had any right, power, or authority to take or condemn private property for the purpose of milling or manufacturing of any kind, or for the purpose of transfer, sale, or lease thereof to others, for any purpose other than navigation."

There is but little conflicting evidence in the case. The denial (page 20, record) of any purchase or condemnation of any interest in lot 5, and the denial that Beardsley waived condemnation and appraisal of damages, raises, as it seems to me, the only disputed question *of fact* in the case material to this issue.

There is substantially no difference between the findings of the trial court (pages 45 to 48, record), and the statement of facts made by the Supreme Court. (Pages 83 to 88 Record; also found in 70 Wis., pages 636 to 645.)

STATEMENT OF FACTS BY SUPREME COURT.

"The plaintiff corporation controls and uses a portion of a water power at Kaukauna, in this state, erected by a dam across the Fox River at that place, which was created for the purpose of improving the navigation of that river and claims to own all the surplus water power created by such dam. The water is drawn by the plaintiff from the pond above the dam into a canal on the north side of the river, and is there used by lessees of the plaintiff to propel machinery. The canal is a part of the improvement, and is navigated by boats and vessels. The defendant, *Kaukauna Water Power Company*, is the owner of the land on the south side of the river, abutting such dam, and of land above and below the same on the river, and has constructed a canal for the purpose of taking water through it from said pond to operate mills and machinery on its land below the dam. The other defendants are in the use of portions of the water so taken from the pond by the defendant corporation under

and by virtue of leases thereof to them executed by the defendant, *Kaukauna Water Power Company*.

This action was brought to restrain the defendants from drawing water from said pond through the canal on the south side of the river, and also to compel the defendant, *The Kaukauna Water Power Company*, to restore an embankment on lot 6, which it had removed, or to permit the plaintiff to do so.

By an act approved August 8, 1846, Congress granted to the State of Wisconsin, when it should be admitted into the union, a quantity of land to aid in the improvement of the Fox and Wisconsin Rivers and to connect the same by a canal. This act contains certain restrictions not material to this case. By an act of the legislature, approved June 29, 1848, the State of Wisconsin gave its assent to the Act of Congress, of August 8, 1846, which operated as an acceptance by the state of the grant therein contained upon the terms and conditions specified in the latter act. By an act entitled "An act to provide for the improvement of the Fox and Wisconsin Rivers and connecting the same by a canal," approved August 8, 1848, the legislature created a board of public works to supervise and carry on such improvements. Sections 15, 16, and 17 (which are most material in this case) are as follows:

"Sec. 15. In the construction of such improvements the said board shall have power to enter on, to take possession of, and use all lands, waters, and materials the appropriation of which for the use of such works of improvement shall, in their judgment, be necessary.

"Sec. 16. When any lands, waters, or materials appropriated by the board to the use of said improvements shall belong to the state such lands, waters, or materials and so much of the adjoining land as may be valuable for hydraulic or commercial purposes shall be absolutely reserved to the state, and whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers such water power shall belong to the state, subject to future action of the legislature.

"Sec. 17. When any lands, waters, or materials appropriated by the board to the use of the public in the construction of said improvements shall not be freely given or granted to the state, or the said board cannot agree with the owner as to the terms on

which the same shall be granted, the superintendent, under the directions of the board, shall select an appraiser, and the owner shall select another appraiser, who together, if they are unable to agree, shall select a third, neither of whom shall have any interest, directly or indirectly in the subject-matter, nor be of kin to such owner, and said appraisers, or majority of them, shall proceed to hear testimony and assess the benefits or damages, as the case may be, to the said owner from the appropriation of such land, water, or materials, and their award shall be conclusive, unless modified as herein provided. If the owner shall neglect or refuse to appoint an appraiser as herein directed, after ten days notice of such appointment by the superintendent, then such superintendent shall make such appointment for him."

From the award of the appraisers made pursuant to section 17 an appeal to the Circuit Court is given to either party by section 18 of the act, and the procedure therein is prescribed in the following sections:

The plan of making the improvement under the supervision of the board of public works proved a failure and was abandoned in 1853 by the enactment of chapter 98, general laws of that year, entitled "An act to incorporate an association for the completion of the improvement of the Fox and Wisconsin Rivers," approved July 6, 1853. This act incorporated the "Fox and Wisconsin Improvement Company," and granted to it all the lands then unsold which had theretofore been granted by Congress to the state in aid of such improvement, subject to certain conditions specified in the act. It also granted such company "the works of improvement contemplated by the act of August 8, 1848, and by several acts supplemental thereto and amendatory thereof, and known as the 'Fox and Wisconsin Rivers Improvement,' together with all and singular the rights-of-way, dams, locks, canals, water power, and other appurtenances of said works; also all the rights possessed by the state of demanding and receiving tolls and rents for the same, so far as the state possesses or is authorized to grant the same, and all privileges of constructing said works and repairing the same, and all other rights and privileges belonging to the improvement, to the same extent and in the same manner that the state

now holds or may exercise such rights by virtue of the acts above referred to in this section (section 2)."

Chapter 112, laws 1856, renewed and confirmed the grant to the improvement company, but upon the condition, among others, that such company should, within 90 days after the passage of the act, make a deed of trust to three trustees, to be appointed by the Governor, with the assent of the company, conveying to such trustees the lands thus granted to the company by the act, and all the other property, rights, and franchises belonging to the company, in trust for certain uses and purposes therein expressed. Such conveyance was duly made by the company, as required by the act, to the trustees duly selected for that purpose.

By chapter 179, laws of 1851, the legislature authorized the Governor to enter into a contract with Morgan L. Martin, for the completion of the improvement of Fox River between Green Bay and Lake Winnebago, and a contract to that effect was duly entered into, pursuant to that act, May 14, 1851. This was while the improvement was under the supervision of the board of public works. Under this contract Martin built the dam in question at Kaukauna in 1854 and 1855.

The Fox river at the point where such dam is erected runs nearly east. At its north end the dam abutted upon land of the improvement company, and at its south end on a lot designated as lot 5. West of lot 5, abutting on the river, are lots 6 and 7. A canal on the north side of the river is supplied with water from the pond. It is constructed with locks and is used for purposes of navigation. The south bank of the river was but little higher than the waters of the river in its natural state, and required an embaknment to keep the same within the channel of the river. The company thereupon procured from one John Hunt, who was then the owner of lots 6 and 7, an instrument in writing, dated October 6, 1854, executed and recorded as a deed, in and by which Hunt released to the Fox and Wisconsin Improvement Company and its legal representatives "the right to erect and forever maintain an embankment of the dimensions as surveyed by the engineer of said company reserving to myself the right to use said embankment when completed, but not so that the same shall be injured, through lots 6 and 7. Section 22. Also the privilege of excava-

ting a ditch along the south or east side of said embankment, not exceeding three feet in width, and upon the south or east side of said survey and stakes as set by said engineer."

The company erected such embankment and extended the same upon lot 5 to the dam. No authority from the owner of lot 5 to erect or abut the dam upon that lot or to build such embankment in front of it and no condemnation proceedings under the act of 1848 to obtain an appraisal of damages to such lot were proved on the trial.

The Fox and Wisconsin Improvement Company having made default in the performance of the conditions of the act of 1853, and of the trust deed above mentioned and of a certain mortgage in trust executed by said company upon all the property, rights, and franchises granted to it by the state as aforesaid, such trust deed and trust mortgage were duly foreclosed in the Circuit Court, and judgment for the sale of said property, rights, and franchises was entered February 4, 1864. Pursuant to that judgment such property, franchises, etc., were sold to the plaintiff, which was a duly organized corporation, authorized by law to make such purchase. Out of the proceeds of such sale a debt of over $200,000 against the improvement, sometimes called (but erroneously) a state debt, was paid and the improvement completed at an expense of over $43,000. Thus the trust conferred upon the state by the act of Congress of 1846 was fully performed. Such sale was confirmed by the court, and the trustees in the trust deed before mentioned, who had previously been appointed by the court as referees to sell the mortgaged and trust property, duly conveyed the same to the plaintiff, *The Green Bay and Mississippi Canal Company*.

The only surviving mortgagee in trust joined as a grantor in such conveyance. By the terms of the deed the trustee, mortgagee, and referees as aforesaid, granted, etc., to the plaintiff, its successors, etc., "the works of improvement known as the Fox and Wisconsin River Improvement, together with all and singular the rights of way, dams, locks, canals, and other appurtenances of said works, the right of receiving tolls and rents for the same, and the privileges of said works, and all other rights, powers, and privileges by the State of Wisconsin granted to and vested in the Fox and Wisconsin Improvement Company and its trustees, or

either, under and by virtue of the several acts of the legislature of the State of Wisconsin in relation thereto, approved July 6, A. D. 1853, March 31st, A. D. 1855, and October 3d, 1856, and the acts amendatory thereof and proceedings thereunder; to which said several acts of the legislature and the trust deed and the mortgage referred to in the judgment under which the aforesaid sale was made, reference is hereby made for a fuller and more particular description of the said works of improvement, rights, powers, privileges, etc., also all other corporative rights, privileges, franchises, powers, and property, real and personal, vested in and belonging to said company, its trustees, or both, forming a part of or in any way connected with said improvement, of whatever name or nature and from whatever source derived, and all appurtenances thereunto appertaining, including and together with all strips or parcels of land adjacent to said improvement or the water powers created thereby, with such exceptions therefrom as are hereinafter stated." The exceptions referred to do not effect this case.

By an act of Congress entitled "An act for the improvement of a water communication between the Mississippi River and Lake Michigan by the Wisconsin and Fox Rivers," approved July 7, 1870, the Secretary of War was authorized, on certain terms and conditions, to purchase the rights, franchises, and property of the plaintiff in such improvement. By chapter 416, laws of 1871, the legislature authorized the plaintiff to make such sale. Arbitrators were duly appointed under the act of Congress to appraise the property, etc., of the plaintiff, which the United States proposed to purchase. Such proceedings were thereupon had that on November 15th, 1871 (I add, see report for its date), the arbitrators reported the total value of such property, etc., to be $1,048,070, and that the amount realized from the sale of lands granted to the state as aforesaid was $723,070, which last sum being deducted from the total value (as required by the act of 1870), left a balance of $325,000 to be paid for all the property and franchises of the company. This appraisal included all water power and personal property owned by the plaintiff. The board separately appraised the value of the water power belonging to the company at $140,000 and of certain personal property at $40,000.

Under the authority of the Act of 1870, the Secretary of War elected not to purchase such water power or personal property, and the same was thereupon reserved to the plaintiff in its conveyance to the United States of the property purchased by it. The specific description of the reserved water power is as follows:

"The water powers created by the dams and by the use of the surplus water not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto, and the lots, pieces, or parcels of land necesssary to the enjoyment of the same and those acquired with reference to the same, all subject to the right to use the water for all purposes of navigation, as the same is reserved in leases heretofore made by said company, a blank form of which, attached to the said report of said arbitrators is now on file in the office of the Secretary of War, and to which reference is here made, and subject also to all leases, grants and assignments made by said company, the said lease, etc., being also reserved herefrom."

The plaintiff owns the lots on the north side of the river along the canal on which the surplus water is used by its lessees.

The principal defendant, the Kaukauna Water Power Company, is the owner of lots 5, 6 and 7, on the south side of the river (or at least of the water fronts thereof), and of contiguous lands fronting upon the river east of and below lot 5. These lots were purchased of the United States of (by) one Denniston, September 1st, 1835, and the same were patented to him or his assigns without reservation by the United States in 1837. Said company derives its title to such lots through mesne conveyances from Denniston.

In 1876 the United States erected a new dam at Kaukauna, across Fox River, 40 feet east of and below the old dam, at its south end, and 110 at its north end. The old dam still remains, but is flooded and rendered useless by the new structure. The embankment upon lot 5 was thereupon extended down the river by the United States to the new dam.

In January, 1881, the Kaukauna Water Power Company commenced to build a canal on its land with intent to cut the bank of the river on lots 5 and 6 and to draw water for hydraulic purposes from the pond raised by the dam in question. The plaintiff thereupon gave notice to that company in writing that it would resist

the cutting of the embankment. The defendant company, however, proceeded with the canal, cut through the embankment on lots 5 and 6, but mostly on lot 6, and has since drawn and still draws water from such pond for the purpose of driving machinery located upon such canal. At the head of its canal the defendant company has erected a gate, which, when closed, stops the water as effectually as did the embankment which was cut through. By an Act of Congress, approved March 3d, 1875, the United States assumed the payment of compensation for flowage or injury to lands caused by the improvements, for which compensation was legally owing when the act was passed, and authorized proceedings in the courts of this state to ascertain the same.

The foregoing facts appear from the pleadings, testimony, and findings of the court.

OPINION.

LYON, J. (after stating the facts):

The controlling question in this case is, has the defendant, The Kaukauna Water Power Company, the right to cut the embankment on lots 5 and 6, on the south side of the river, and draw water from the pond made by the Kaukauna dam for the purpose of propelling machinery located in its canal below the dam? The solution of this question requires the determination of several other questions, which will be stated and considered in their order:

1. The claim of the plaintiff corporation to all the surplus water power created by the dam is based upon the proposition that section 16 of the act of the legislature approved August 8, 1848, appropriates all such water power to the state. This proposition is disputed on behalf of the defendants. Their counsel maintain that section 16 only gives the state such surplus water power created by the improvement as may exist upon lands owned by the state, and that inasmuch as the state was not the owner of the lands upon which the Kaukauna dam was erected the section does not apply to the surplus water power thereby created. Their argument is, in substance, that, inasmuch as the first clause of the section only reserves to the state such land, water, or materials appropriated by the board for the use of such improvements as

belonged to the state, the last clause, which provides that water power created by the improvement shall belong to the state, must be held to apply only to such water power as is made by dams erected on state lands—in other words, they seek to apply to this section the maxim *noscitur a sociis*. We cannot adopt this construction. The statute absolutely reserves to the state, property belonging to it mentioned in the first clause, and at the same time confers upon the state the water power therein mentioned—that is to say, such water power as should thereafter be created "by reason of any dam erected or other improvements made on any of said rivers" (including the Fox River), which otherwise did not belong to the state. This was necessary in order to give the state the absolute control of the improvement, and such is the plain reading of the statute. Section 16 will be found copied in the foregoing statement of the case.

It requires no argument to demonstrate that the water powers reserved to the state by section 16 of the act of 1848 were granted to the Fox and Wisconsin Improvement Company by chapter 98, laws 1853; that the same passed to the plaintiff by the purchase, under foreclosure, of the trust deed and mortgage and the conveyance thereof to it by the trustees and mortgagees therein, and that in its conveyance to the United States the plaintiff reserved to itself all of the surplus water power created by the improvement. We conclude, therefore, that whatever rights the state took to the Kaukauna water power by the act of 1848 (which is the absolute ownership of the whole thereof, if that is a valid act), is vested in the plaintiff.

2. It is further maintained on behalf of the defendants, that, conceding the Kaukauna water power is within the provision of section 16 of the act of 1848, such act is invalid as to the surplus of the water power over and above that required for the navigation of the river, for the reason that it is taking private property for private use, which is beyond the power of the legislature. Here, also, we are compelled to differ with the learned counsel for the defendants. It was necessary to erect the Kaukauna dam for the purpose of making the river at that point available for navigation. Without it slack water navigation would have been impossible. It was of vital interest, therefore, to the state, that it or the corpora-

tion to which it entrusted the preservation and maintenance of the improvement should have the entire and absolute control of the dam, embankments, canals, and all appliances necessary for the purposes of navigation, as well as of the waters in the pond created by the dam. It would be a serious detriment to the public interests were each riparian owner entitled to cut the dam, or the embankment which is a part thereof, and draw water from the pond. The exercise of such a right might, and probably would, seriously interfere with the proper management of the improvement, greatly to the detriment of the free and unrestricted navigation of the river. It was impossible to make the improvement in a proper manner and to meet the requirements of navigation without creating some surplus water power, but for the reasons above suggested, such surplus was merely incidental to the improvement.

In *Attorney General vs. City of Eau Claire*, 37 Wis. 400, and again in *State vs. Eau Claire*, 40 Wis. 533, it was held that a statute which authorized the city of Eau Claire to erect a dam and raise the waters of the Chippewa river for the purpose of creating public water works in said city, and which granted to the city the right to lease the surplus water power created by such improvement, was a valid law. In the opinion of the court, prepared by Ryan, C. J., in each case, speaking of the power granted to the city to construct water works, it is said: "That is so essentially a public and municipal purpose it is obvious that the city can take any legitimate power in aid of it. For that purpose the legislature could unquestionably grant and the city take power to construct and maintain a dam not obstructing the navigation of a public river or violating other rights, public or private, and the dam so authorized might well produce an excess of power. *Superflua non nocent.* In such a case, as was frankly admitted on the argument, the surplus water need not run to waste. The legislature might well grant and the city take power to lease it. The power to construct and maintain the dam would still rest on the public municipal use, not on the disposition of the accidental excess. *Spaulding vs. Lowell*, 23 Pick. 71." Manifestly the principle of that case is applicable here.

3. It is further claimed on behalf of the defendants that by locating the south end of the dam upon lot 5, building an embank-

ment thereon, and on lots 6 and 7, and appropriating the whole water power created by the dam, the state took the property of the owners of those lots, and that the laws of the state made no adequate provision for compensating them therefor. A riparian owner upon a navigable stream has no right, without legislative consent, to build a dam across such stream for any purpose. *Improvement Company vs. Lyons*, 30 Wis. 61. He has the right, however, to pass from his land to the river and from the river to his land, and to utilize the waters of the river upon his land for any purpose not interfering with navigation of the stream or the rights of other riparian owners. That the construction of the Kaukauna dam and improvement by the state and its appropriation of the water power thereby created take the property of the owner of lot 5 and deprive him of his riparian rights just mentioned (which are also property), does not seem to admit of doubt or controversy. Such owner has never been compensated for his property so taken; neither has he released his right thereto.

As to lots 6 and 7, we incline to the opinion that the instrument, denominated a release, executed by Hunt to the Fox & Wisconsin Improvement Company in 1854 (Hunt being then the owner of those lots), in and by which he granted to that company and its legal representatives "the right to erect and forever maintain an embankment of the dimensions as surveyed by the engineer of said company," operates as a surrender of all riparian rights appurtenant to such lots, not reserved in the instrument. The instrument recites a consideration of $100, and Hunt reserved therein "the right to use said embankment when completed, but not so that the same shall be injured." He also reserved the right to excavate a ditch of certain dimensions on the land on the south side of the embankment. The embankment was surveyed and located along the margin of the river, and was so granted and erected for the purpose of confining the waters of the river within its natural banks, after it should be raised by the erection of the dam.

The act of 1848 is certainly liable to the criticism that it makes no adequate provision for compensating the owners of property taken for the improvement. True, it contains provisions in section 17 (which section is copied in the statement of the case) and in subsequent sections for the condemnation of private property to the use

of the improvement. Because of these provisions, Dixon, C. J., in delivering the opinion of the court in *Arimond vs. G. B. & M. Canal Co.* (this plaintiff), 31 Wis. 316, controverted a supposed statement of the Supreme Court of the United States in *Pumpelly vs. G. B. Co.* 13 Wall. 166, to the effect that the laws of this state failed to provide for making such compensation. We all overlooked the fact that the court in that case was determining the sufficiency of certain pleas, and only stated the case made by such pleas. It did not assume to say what were the laws of this state on the subject.

But the act of 1848 failed to give the land-owner the right to institute condemnation proceedings under it to have his compensation determined; and if the state should institute such proceedings, the compensation, when determined, was, by Sec. 21 of the act, made payable out of the fund appropriated to such improvement. By Sec. 20 the recording in the office of the register of deeds of a transcript of the award, signed by the appraisers and acknowledged or proved as a conveyance of land, operated to vest in the state the fee-simple of the premises condemned to the use of the improvement. This, without requiring the sum so awarded as compensation to be first paid. The history of the improvement during the time it was in the hands of the board of public works and of the Fox & Wisconsin Improvement Company, shows that the improvement fund was a very uncertain source to rely upon for the payment of a debt charged upon it. No other provision was made in the act of 1848, or in any other act of the legislature, for the condemnation of property to the use of the improvement, or for payment therefor. In view of these serious defects in the law, and especially because the owner of the property taken for the purposes of the improvement was powerless to institute proceedings to have the compensation ascertained to which he was entitled, Mr. Justice Orton said in *Sweeney vs. U. S.*, 62 Wis. 396, that, until the passage of the Act of Congress of 1875, there was no provision of law for the ascertainment and payment of the damages and compensation for the taking of lands by flowage or otherwise for the use of the improvement. Looking to the practical operation of the statute, the statement thus made is substantially correct, although, perhaps, inaccurate in theory and form. But whatever defects inhered in the act of 1848, they ceased long since to be of any importance. That

act was fully executed, the improvement which it authorized has been made and ever since maintained, and the title thereto, except to the incidental surplus water power reserved by the plaintiff, has passed to the United States. The failure of the state legislature to provide adequate compensation for private property taken for, or injured by, the improvement, has been supplied by the Act of Congress of 1875, in and by which an easy method is provided to ascertain the compensation to which the owner of such property is entitled, and the United States has assumed the payment thereof. *Jones vs. U. S.*, 48 Wis. 385, affirmed in 109 U. S. 513; *Sweaney vs. U. S.*, 62 Wis. 396.

4. A prescriptive right to maintain the south half of the dam on lot 5, founded upon twenty years' uninterrupted adverse user, is claimed on behalf of the plaintiff. Inasmuch as we are of the opinion that the United States has the legal right to maintain the dam on lot 5, without regard to any prescription, it is quite immaterial whether such claim is well founded or otherwise. It probably is not well founded as to the additional embankment constructed from the old to the new dam; perhaps not as to the portion of the new dam on lot 5, which includes all of the structure south of the center of the stream. But however the question of prescription should be decided were it material, it seems quite clear that no statute of limitations has run against the right of the present owner of lot 5 to recover of the United States compensation for the portion of that lot taken for the improvement, and for the injury to the lot caused thereby. The Act of Congress giving such compensation was approved March 3, 1875, and it provided for the payment of such claims, legally owing at that date. The act, by its terms, provides for cases in which "compensation is now or shall become legally owing." Of course, it speaks from the date of its approval. The original Kaukauna dam was not erected on lot 5 until after March 3d, 1855. This satisfactorily appears by the testimony of Hon. Morgan L. Martin, who erected the dam. He testified, in substance, that he entered upon the bed of the stream for the construction of the dam after warm weather commenced in the spring of 1855. Of course, in the latitude of Kaukauna, that must have been later than March 3d. We suppose the right to compensation was not cut off

until a prescriptive right to maintain the dam had matured by twenty years' adverse user. Hence, when the act of March 3d, 1875, was passed, compensation was owing to the owner of lot 5 for the taking of and injury to his property, which is still a valid claim against the United States. And this, we think, includes any deprivation or interruption of any legal riparian right. On this subject, generally, see the cases of *Jones vs. U. S.*, and *Sweaney vs. U. S.*, above cited.

5. It follows, we think, from the views above expressed, that neither of the defendants had any right whatever to draw water from the pond in question, and that the plaintiff is the legal owner of the water power created by such dam over and above what is required for navigation. The plaintiff was therefore entitled to an injunction restraining the defendants from drawing the water from the pond for the purposes aforesaid.

6. A mandatory injunction, requiring the water power company to restore the embankment, or at least to allow it to be done, is also prayed. The dam and embankment belong to the United States. The plaintiff has no legal interest therein, no duty in respect to it, and no right to interfere with it unless by permission of the government. It is only interested in the surplus water power, created by the government works, and maintained at such height as the government chooses to maintain it. The government may lower the dam and embankment, or may remove the same and destroy the water power entirely, and the plaintiff cannot prevent it. The government may also use such appliances as it chooses to keep up a head of water It may retain the embankment on lots 5, 6, and 7, or use some other means of holding the water, and the plaintiff is in no position to object. Hence it is entirely a question between the United States and The Kaukauna Water Power Company whether such embankment shall be restored where the company cut through it, or whether the head gates of the canal, which, when closed, stop the water as effectually as did the embankment, shall be allowed to remain in place of the embankment. The plaintiff has no voice in the determination of that question. Hence the prayer for a mandatory injunction compelling the water power company to restore the embankment, or to allow the plaintiff to do so, must be denied.

We do not here determine the relative rights of the plaintiff and other riparian owners below the dam, in respect to the use of the water which would run over the dam if not taken from the pond into the canal; nor do we consider whether there is any restriction upon the manner or place in which the water shall be returned to the river below the dam. We only hold that the plaintiff owns the surplus water power created by the dam, and that the defendants have no legal right, without the consent of the plaintiff, to draw water from the pond with which to propel machinery.

* * * * * * * *

The case is a very important one, and any judgment finally entered in it may, probably will, be far-reaching in its effect upon water rights on the Fox River. The writer ventures to express the opinion that there are federal questions involved in it which will support an appeal to the Supreme Court of the United States, and the desire that such an appeal may be taken, to the end that the relative rights of the plaintiff and other claimants to water power created by the improvement of the Fox River, now owned by the United States, may be finally determined by that tribunal.

The following opinion was filed February 28, 1888:

LYON, J. Each party has moved for a re-hearing of the cause. We do not care to discuss the case further on the defendant's motion, as we find nothing in the argument in support of it which leads us to distrust the accuracy of the judgment hereinbefore announced.

The plaintiffs' motion is not for the purpose of changing the judgment, but to procure a modification of what is said in the opinion respecting the relative rights of the plaintiff and the United States in the improvements which create the water power in controversy. What was there said on that subject seemed to be called for by the prayer for a mandatory injunction contained in the complaint. It was certainly pertinent to that branch of the case, and hence not *obiter dictum*. Yet it was absolutely essential to a determination of the right to such injunction. The refusal of such injunction may as well be rested in the discretionary power of the court in that behalf. Inasmuch as the head gates to the defendants' canal, stop the water as effectually as would an embankment of earth, and the plaintiff is not

injured by leaving the gates as they are, a refusal of the injunction prayed is a very proper exercise of the discretion of the court. Because the United States is not a party to this litigation, and because the question of its rights in the works of the improvement, as affecting the plaintiff, has not been fully argued, we are constrained to so far modify the former opinion as to leave the question of the relative rights of the plaintiff and the United States in and to the dams and other works pertaining to the Fox River Improvement open and undetermined. A rehearing is unnecessary.

ASSIGNMENT OF ERRORS.

1. That the complaint aforesaid and the matters therein contained are not sufficient in law for the said Green Bay and Mississippi Canal Company, defendant in error, to have or maintain its aforesaid action thereof against the said plaintiffs in error.

2. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said defendant in error, said Green Bay and Mississippi Canal Company, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs in error against the said defendant in error.

3d. There is also error in this, to wit: By and under said judgment of the Supreme Court of the State of Wisconsin the property of said plaintiff in error is, under and by virtue of the act of the State of Wisconsin, approved August 8th, 1848, entitled, "An act to provide for the improvement of the Fox and Wisconsin Rivers and connect the same by a canal," as interpreted and enforced by said Supreme Court of the State of Wisconsin in its said judgment, taken for a private purpose, and said plaintiffs in error are thus and thereby deprived of their property without due process of law and contrary to the provisions of the fourteenth amendment of the constitution of the United States.

4th. It was error for said Supreme Court of the State of Wisconsin to decide that that part of the said act of the State of Wisconsin approved August 8th, 1848, which, as construed and interpreted by its said judgment, authorized and directed the taking of all of the

water power created by reason of the so-called government dam, mentioned in the complaint in said suit, over and above what thereof was necessary for the purposes of navigation, was valid and constitutional, and in thus holding that said act of the legislature of the State of Wisconsin, as thus construed, was not repugnant to the provisions of the fourteenth amendment of the constitution of the United States.

5th. It was also error for said Supreme Court of the State of Wisconsin to decide, in and by its said judgment, that the authority exercised under said State of Wisconsin, pursuant to the provisions of said act of 1848, in the taking of, and which took and appropriated to the use or purposes of the State of Wiconsin all the water power of said Kaukauna Water Power Company, at the place in question, over and above what was necessary for the purposes of navigation, was valid and constitutional and not repugnant to the provisions of the constitution of the United States or to the provisions of the fourteenth amendment thereof.

6th. There is also error in said judgment of the Supreme Court of the State of Wisconsin in holding and deciding that the said plaintiffs in error be perpetually enjoined from drawing any water for hydraulic power from the pond maintained by the dam across Fox River, in the city of Kaukauna, in the county of Outagamie and State of Wisconsin, resting (on the south side of said river) upon lot five of section twenty-two, south of the river, and upon fractional section twenty-four, on the north side of the river, in town 21 north, of range 18 east, mentioned in the complaint, thereby deciding that the State of Wisconsin had lawful right under the provisions of the said act of the legislature of 1848 to take and appropriate to private purposes all of the water power upon or belonging to said lot five (5), over and above what is required for the purpose of navigation.

7th. There is also error in said judgment in this, to wit: That by the same it is adjudged that the said defendant in error is the legal owner of all the water power created by said government dam over and above what is required for navigation, thus and thereby deciding that the said water power upon said lot five, over and above the water necessary for navigation (which, without said act of 1848, belonged to the said plaintiff in error, Kaukauna Water

Power Company), was so taken for a public and not a private purpose; also thereby deciding that the authority by which the same was so taken was exercised under the State of Wisconsin pursuant to the provisions of said act of the legislature approved August 8th, 1848, and thereby also deciding that said act of the legislature of 1848 and the authority so exercised under it were valid and not repugnant to the constitution of the United States or the fourteenth amendment thereof.

8th. There is also error in this, to wit: That by the record aforesaid, it is adjudged that the said act of the legislature of the State of Wisconsin, approved August 8th, 1848, in so far as it authorized the taking of private property for public use, is valid and effectual for the transfer of title thereunder, although it contains no legal or valid provision for the making of compensation therefor to the owner of property so taken; and thereby deciding that the said state of Wisconsin did not enforce said act of 1848 to the depriving of the said plaintiffs in error of their property without due process of law.

9th. There is also error in this, to-wit: That by the said final judgment the State of Wisconsin enforced the said act of 1848, so as to deprive the plaintiffs in error of their property without due process of law.

10th. There is also error in this, to-wit, that by the said final judgment the State of Wisconsin enforced the said act of 1848, so as to deprive the said Kaukauna Water Power Company of its property, to-wit, of the said water power or the use of its said water over and above what was necessary for the purpose of navigation, without due process of law, in that it is decided by said judgment that the State of Wisconsin became the owner of said surplus water power by virtue of the provisions of said act of August 8th, 1848, without making due or any compensation to the owner therefor.

11th. The Supreme Court below reversed the judgment of the Circuit Court, upon the ground, as stated in the opinion, that notwithstanding the act of August 8th, 1848, contained no provision for securing or making compensation to the owner for the water power so taken, in excess of what was necessary for the purposes of navigation, yet that such owner had ample remedy or recourse

therefor against the United States of America. In this decision there was error, for which the said judgment should be reversed; and the said plaintiffs in error pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of said judgment."

ARGUMENT.

By the 3rd, 4th, 5th, 6th and 7th assignments of error, varied somewhat in phraseology, we seek to raise the question whether or not the taking of the water power in question by the State of Wisconsin was for a private purpose, and, if for a private purpose, whether such taking was not contrary to the provisions of the 14th amendment of the Constitution of the United States, in that it was a taking without due process of law.

By the four remaining assignments of error, we seek to raise the question, whether or not (conceding the taking to have been for a public purpose), the act of August 8th, 1848, was not void, because it made no legal provision for the payment of due compensation, and whether the State of Wisconsin, by the judgment brought here for review, has not deprived the plaintiffs in error of their property without due process of law.

I.

I respectfully submit that the question, as to whether the use was for a public or private purpose, is open here for discussion, notwithstanding the fact that this court usually adopts the construction put upon a state statute by the court of last resort of the state where enacted.

Jefferson Branch Bank vs. Skelly, 1 Black, 443.

Bridge Proprietors vs. Hoboken Co., [illegible]

the application made to it and by this court on appeal [illegible]

Power Company), was so taken for a public and not a private purpose; also thereby deciding that the authority by which the same was so taken was exercised under the State of Wisconsin pursuant to the provisions of said act of the legislature approved August 8th, 1848, and thereby also deciding that said act of the legislature of 1848 and the authority so exercised under it were valid and not repugnant to the constitution of the United States or the fourteenth amendment thereof.

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Jefferson Branch Bank vs. Skelly, 1 Black, 443.
Bridge Proprietors vs. Hoboken Co., 1 Wall. 144, 145.
McMillen vs. Anderson, 95 U. S., pp. 37 to 42.
Yick Wo vs. Hopkins, Sheriff, 118 U. S. 356.
Crowley vs. Christensen, 137 U. S. 92.

Gormley v. Clark, 134 U. S. 348
Chicago &c. Ry. Co. v. Minn. 134 U. S. 418
Minneapolis &c. Ry. Co. v. Minn. 134 U. S. 467
Johnson v. Risk, 137 U. S. 301

In *Jefferson Branch Bank vs. Skelly*, first above cited, page 443, this court says :

"Of what use would the appellate power be to the litigant, who feels himself agrieved by some particular state legislation, if this court could not decide, independently by of all adjudication by the Supreme Court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract, and within the protection of the Constitution of the United States—and that its obligation should be enforced notwithstanding a contrary conclusion by the Supreme Court of a state? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could, with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a state in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the Supreme Court of a state upon such a contract, whether it be one claimed to be such under the form of state legislation, or has been made by a covenant or agreement by the agents of a state by its authority."

In *Bridge Proprietors vs. Hoboken Company*, 1st Wall. 144, the court says:

" It is said, however, that it is not the validity of the act of 1860 which is complained of by the plaintiffs, but the construction placed upon that act by the State Court. If this construction is one which violates the plaintiff's contract, and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court; and that this court will not be discharging its duty to see that no state legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction in such cases."

In the case of *Yick Wo vs. Hopkins*, above cited, it was contended by counsel for the defendant in error, as it is here, that the state may construe her own laws; this court, in answer, says: (p. 365):

" The question whether his imprisonment is illegal under the *constitution and laws of the state, is not* open to us. And although that question might have been considered in the Circuit Court, in the application made to it and by this court on appeal from its

order, yet judicial propriety is best consulted by accepting the judgment of the state court upon the points involved in *that* inquiry.

That, however, does not preclude this court from putting upon the ordinances of the supervisors of the county and City of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances, and in enforcement of them, are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge.

We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinance in question."

II.

The third assignment of error is as follows: "By and under said judgment of the Supreme Court of the State of Wisconsin the property of said plaintiffs in error is, under and by virtue of the Act of the State of Wisconsin, approved August 8th, 1848, entitled 'An act to provide for the improvement of the Fox and Wisconsin Rivers, and connecting the same by a canal,' as interpreted and enforced by said Supreme Court of the State of Wisconsin in its said judgment, taken for a private purpose, and said plaintiffs in error are thus and thereby deprived of their property without due process of law and contrary to the provisions of the fourteenth amendment of the constitution of the United States."

a. The first inquiry, under this head, is whether the plaintiff in error, Kaukauna Water Power Company, was possessed of the property of which it claims to have been illegally deprived.

Hoadley vs. San Francisco, 124 U. S. 639-645.

The record shows, and it is undisputed, that the Kaukauna Water Power Company is the owner of all the land bordering upon the south side of Fox River for some distance above and below

the point of abuttal of the government dam. That the land upon the opposite side of the river, prior to the sale to the United States of the improvement belongs to the defendant in error. The record also shows that the Water Power Company derived its title to lot 5 from Beardsley, by whom the same was purchased from the United States government in 1833, and that the same was patented, without reservation, to the predecessor in title of the Water Power Company by the United States on the 10th of August, 1837. (See copy of patent, pages 78 and 79, record.)

The record also shows, that at the place in question, there were rapids and several feet fall in the Fox River, and that the government dam raised a head of water of between 8 and 9 feet. It will be seen, from an inspection of the map found between pages 82 and 83, record, that the down stream boundary of lot 5 strikes the margin of the river some distance below or down stream from the dam.

Upon this state of facts, under the law as established by the decisions of the Supreme Court of the State of Wisconsin, the land of the Water Power Company extends to the center line or thread of the river, notwithstanding the fact that the stream is navigable.

Jones vs. Pettibone, 2 Wis. 308.
Olson vs. Merrill, 42 Wis. 210.
Norcross vs. Griffiths, 65 Wis. 599.
The State vs. Carpenter, 68 Wis. 172.
Chandos, adm'r of Bensley vs. Mack, 77 Wis. 573, 577.
Walker et al., vs. Board of Public Works, 16 Ohio, 544.
June vs. Purcell, 36 Ohio State, 405.

In *Chandos, administrator vs. Mack*, above cited it was held that a grant from the government, without reservation, of lands on the bank of a navigable river in Wisconsin, vests in the purchaser the title to any unsurveyed islands lying between the main land and the center of the stream.

This court, in *Barney vs. Keokuk*, 94 U. S. 324, held, that it is for the several states to determine for themselves to what extent the prerogative of the state extends over lands under the

water of navigable streams. This decision was approved and followed in *Hardin vs. Jordan*, 140 U. S. 371–382.

With reference to *Barney vs. Keokuk*, the Supreme Court of Wisconsin, in *Olson vs. Merrill, supra* (page 212) says:

"This view, so far as may have been necessary, *leaves this court free to adhere to a doctrine almost as old as the state, and which it would now be very mischievous to disturb.* And as to its policy, we may be permitted to remark that we consider the wisdom of the rule of this court amply vindicated in the very able exposition of the question in *S. B. Magnolia vs. Marshall* 39 Miss. 109."

b. By reason of ownership of the bank and of the bed of the stream, the Kaukauna Water Power Company was the owner of the use, while passing, of all of the water which might flow over the bed of the stream; in other words, was the owner of all of the water power which could be utilized upon its land.

Angell on Watercourses, Sec. 90, p. 96 (6 Ed.)
Gould on Waters, p. 360, Sec. 204.
Coulson & Forbes on Waters, pp. 106-107.
Webb vs. Portland Manufacturing Co., 3 Sumner, 189.
Stillman vs. White Rock Manufacturing Co., 3 Woodbury & Minot, 543.
Parker vs. Griswold, 17 Com. 288.
Cooper vs. Williams, 5 Ohio, 393.
Kaukauna Water Power Co. vs. Green Bay & Miss. Canal Co. et al., 75 Wis. 390.
Kimberly & Clark Co. vs. Hewitts and Smith, 48 N. W. Rep. 373.

The court, in *Buckingham et al. vs. Smith & Dille*, 10 Ohio Rep., p. 297, states the doctrine in this language: "The use of the waters of private streams belong to the owners of the lands over which they flow. They are as much individual property as the stones scattered over the soil. If such streams can be passed with boats and rafts, the public has the right of passage, but, subject to such easement, the owner of the land may appropriate the use of the water in his own discretion, taking care not to flow it on the

proprietor above, and to return it to its natural channel before it leaves his own lands."

The Supreme Court of Wisconsin states the same doctrine in the case last above cited (*Kaukauna Water Power Company vs. Green Bay & Mississippi Canal Co., et al.*, 75 Wis., 390), in these words:

"It appears from the complaint, that the plaintiff, as the riparian owner of the entire south bank of the river, from the government dam down to the channel between that bank and Island No. 4, and the entire south bank of that channel from its mouth to the foot of the rapids, including half the bed of the stream, and the equal undivided ¾ of the entire shore or bank of Island No. 4, and of the land under water to the center of the channels, entirely around the same, brings this action for the wrongful diversion of the waters of the river from said lands.

The rule of law, as to the right of the riparian owner respecting the flow of water over his land, is indicated in the authorities cited by counsel. The same principle has recently received direct sanction from the House of Lords, as follows: "It has now been settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturæ*, belongs to the proprietor of the adjoining lands as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbors soil for his own in its natural state, *North Shore R. Co., vs. Pion L. R.* 14 App. Cas. 621."

c. The rights of the Water Power Company, resulting from the above decisions, may, I think, be stated more broadly and perspicuously as against the defendant in error, claiming simply as grantee of and under the state. Owning the south bank of the river, and the land under water to the thread thereof, it had the legal right to extend a dam from the bank to the center of the river, commonly known as a wing dam. How far up stream the outer end of that dam might have lawfully been carried, as it was extended out into the river, and not amount to a diversion of the water from the opposite bank owner, is an interesting question,

but not necessarily involved in this suit; but beyond doubt, the south natural bank of the stream being 3 or 4 feet above the water below the dam (page 64, fol. 98, record), the Water Power Company had the absolute right, so far as the owner of the opposite bank was concerned, to erect such a wing-dam, and by means of a canal, cut upon its own land and opening into the pond above the dam, to utilize *one-half* of the flow of the stream.

Webb vs. Portland Manf. Co., 3 Sumner, 189.
Parker vs. Griswold, 17 Conn., *supra*.

If the Water Power Co. owned the lands upon both sides of the river, it had the undoubted right to extend its dam from bank to bank, and utilize the *whole* flow of the stream, appropriating the *whole* water power to its own use, subject only to the right of the public to the use of the water for the purpose of navigation; and so long as the public, through its proper officers, did not complain, its right to so maintain said dam and use such water power, although water, by raising the dam higher, may have backed onto other private owners above, was just as complete and perfect as if the stream had not been navigable; and if it had raised the dam to its present height and backed water onto private owners above, such owners only could have complained.

I wish here to notice what I conceive to be an incorrect proposition contained in the opinion of the court below, tending, (if indeed it is to have any effect,) to belittle the property rights of the Water Power Company. The court says: "A riparian owner upon a navigable stream has no right, *without legislative consent*, to build a dam across such stream for any purpose." Citing—*Improvement Company vs. Lyons*, 30 Wis., 61.

The whole paragraph, including such sentence is as follows: (page 90, record.)

"It is further claimed on behalf of the defendants that by locating the south end of the dam on lot 5, building an embankment thereon, and on lots 6 and 7, and appropriating the whole water power created by the dam, the state took the property of the

owners of those lots, and that the laws of the state made no adequate provision for compensating them therefor. A riparian owner upon a navigable stream has no right, without legislative consent, to build a dam across such stream for any purpose. *Improvement Company vs. Lyons*, 30 Wis., 61. He has the right, however, to pass from his land to the river and from the river to his land, and to utilize the waters of the river upon his land for any purpose not interfering with navigation of the stream or the rights of other riparian owners. That the construction of the Kaukauna dam and improvement by the state and its appropriation of the water power thereby created take the property of the owner of lot 5 and deprive him of his riparian rights just mentioned (which are also property), does not seem to admit of doubt or controversy. Such owner has never been compensated for his property so taken; neither has he released his right thereto."

In the first place, the proposition that a riparian owner upon a navigable stream has no right, *without legislative consent*, to build a dam across such stream for any purpose, is not, as I understand it, an accurate general proposition of law, because, within all the authorities, the owner of both banks has the right to build such a dam across a navigable stream, unless it interferes with navigation. If he so builds, the proper authorities having charge of, or control over the water-way or highway, may proceed against him for the creation of a *public* nuisance or in any other legal manner, and other riparian owners, as well as navigators, who are especially injured, and can show *private* damage by reason of the erection of such dam or creation of such nuisance, may also maintain actions for such private damage; but no other persons or parties have any standing in court to question the right of a riparian owner to so maintain such a dam upon his own land. Congress has the primary control over navigable waters; when its right is not asserted, the states have such control; (*Escanaba Co. vs. Chicago*, 107 U. S. 678, 683 *and cases cited*,) and they may exercise it in various ways, as, for instance, as was attempted by the Act of the State of Wisconsin of August 8th, 1848, or by delegation of such power to private individuals or corporations. In the case cited, of *Improvement Company vs. Lyons*, *supra*, the State of Wisconsin had delegated

the right and power to improve the navigation of the Wisconsin River *to that* improvement company. It had, pursuant to its charter, improved the river, and was receiving tolls for the running of lumber and logs over the same. Lyons being a riparian owner, undertook to improve his water power by running a wing dam into the Wisconsin River, without having first obtained authority from the legislature. The Improvement Company standing in the place of the state for the protection of navigation, upon the ground that the dam in question would be an injury thereto, commenced the action to restrain the erecting and maintaining of the dam. The *gravamen* of the complaint was that the dam, if completed, would seriously interfere with the navigation of the river, and greatly impair the value of plaintiff's franchise in collecting tolls. The trial court found for the defendant, but the Supreme Court reversed the judgment and sent the case back with directions to enter judgment for the plaintiff, in accordance with the demand of the complaint. Its decision (see page 6,,, being placed, seemingly, upon two grounds: First, that the defendant was a trespasser upon the rights of the public, and, under the statute of the state, could not erect his dam without public permission; and second, that the plaintiff had shown such private and special injury from the obstruction as would enable it to maintain the action.

The case *is certainly not* an authority for the proposition that a riparian owner upon a navigable stream cannot erect and maintain a dam upon his own land across the same, without first obtaining permission from the state. He may certainly do so unless the United States, the State of Wisconsin, or other party acting under them *for the protection of navigation*, objects; and such erection is only actionable at the suit of the public, or of a navigator, or some other riparian owner who has sustained special damage from or by reason of such erection. Hamilton v Moore, 52 Ill. 160

Fort Plain Bridge Co. vs. Smith, 30 N. Y. 44-62-63.

Wetmore vs. The Brooklyn Gas Light Co., 42 N. Y. 384-391-393.

Chemungo Bridge Co. vs. Paige et al., 83 N. Y. 178-185-186-187-188.

Groat et al. vs. Moak, 94 N. Y. 115-128-129.

Roe et al., vs. Strong et al. 107 N. Y. 350-360.

President and Fellows of Harvard College vs. Stearns, 15 Gray 1-9.

Weiss v Wisconsin River Boom Co. v Pattison, 8 Wis. 703-708

In the case of *Fort Plain Bridge Co.*, 30 N. Y. 44, first above cited, the court (page 62) assuming the Mohawk to be navigable, says: "Assuming that it is a public highway and that the bridge is an obstruction to navigation (as the dam of plaintiff in error here might be) and therefore a public nuisance, yet no one has the right to abate it, or sustain an action for damages occasioned by the erection, unless he has himself sustained some damages not sustained by the rest of the community. * * * * But because a bridge over a navigable stream may be a nuisance to those navigating it, it does not follow that it is a nuisance as to others who do not navigate it. * * * *But it is said* (page 63) *that the defendants could not legally erect their bridge without authority from the legislature, and hence any person injured may resist its erection, or recover damages therefor.* (Italics mine). There are three cases in which authority from the legislature is necessary to erect a bridge over a stream. One is when the stream is navigable, 2d, when the state owns the bed of the stream, and 3d, when the right to take toll is desired.

It was decided by the court of errors * * * that the bed of the Mohawk belonged to the state, * * * But I do not understand what right the *plaintiffs* have to complain of this appropriation of the bed of the stream, while the state officers make no objection to it."

In *Wetmore vs. Brooklyn Gas Light Co. supra*, the court (page 394), says: "If the state sees fit to permit the structure to remain, what right has the plaintiff to complain? He is in no respect injured thereby; he can enjoy his right to navigate the river in as free and ample a manner as before."

In *Chenango Bridge Co. vs. Paige, supra*, (83 N. Y. 178), the action was for damages by the Chenango Bridge Co. against the representatives of those who, it was claimed, had, without statutory authority, put in and maintained a bridge over the Chenango river above the bridge of the plaintiff, and which had been swept away by a flood, carrying with it the bridge of the plaintiff. The claim of the plaintiff was that the upper bridge so swept away was an unlawful structure,—a nuisance—and that therefore those who maintained it were liable for the damage caused by its being so

swept down stream, although it was faultlessly constructed and maintained. (Page 184.)

The court held, *inter alia*, that even if the Binghampton Bridge Co. charter was absolutely void (p. 188), "then the corporation must be regarded as non-existent, and the bridge was built by those concerned in the supposed corporation as individuals *having the rights of riparian owners*. They could build the bridge for their private use as riparian owners, or they could build it for no use and permit it to stand as a monument of their folly. And *so long as it did not interfere with the public easement or with riparian rights*, it would neither be a nuisance nor unlawful."

The remaining cases, cited above, are to the same effect.

The Fox was one of the navigable streams mentioned in Article 4 of the Ordinance of 1787, and declared to be a common highway; being such, it was within the protection of the public as a highway, and no person would have had any right to obstruct the same, had no law ever been passed by the territory or State of Wisconsin prohibiting the erection of such dams without territorial or state permission. Wisconsin was a territory in 1837, at the time the lands of the Water Power Company were patented by the United States, so remaining until 1848; and not until the 9th of February, 1841, was any act passed by either the territory of Michigan (of which Wisconsin was part until 1836), or the territory of Wisconsin prohibiting the placing of dams in navigable or meandered streams. Territorial Laws of Wisconsin, 1841, page 34, No. 9; also Taylor's Stats., Vol. 1, p. 749-50, and notes.

It is respectfully submitted that the laws of the territory, and later, of the state, prohibiting the erection of such dams without legislative consent, took away *none* of the property rights of the predecessors in title of the Water Power Company, to whose rights and title the Water Power Company has succeeded, and that the inhibition against obstructing the navigation of Fox river was just as strong before the passage of any such law as it has been since, and that, so far as the defendant in error is concerned, the rights of the Water Power Company are exactly the same to-day as they would have been, under like circumstances, prior to 1841. It is very likely that the Water Power Company is limited by the law of the state as to how it may exercise its rights; it is possible that

the state legislature would have power, in the interest of the public, to pass further acts with reference to the construction of dams and bridges across the Fox river, and prescribing the mode of procedure in the use of the water, or limiting its use at certain times or upon certain occasions, certainly the United States has that power since it has become the owner of this improvement; but as to the right of the proprietor in the water, and in its use (subject only to such public, paramount rights), we maintain that they are the same to-day as if no such law of the state had ever been enacted. But, however this may be, we think it plain that no one but the public, or those acting in its place or behalf, for the protection of public highways, or private individuals sustaining special damage because of the creation of such a claimed nuisance, can complain.

It will not now, I think, be seriously claimed that an act, passed in 1841 by the territorial legislature, can have any bearing upon the *construction* or *interpretation* of an unconditional patent for land made by the United States five or six years prior to that time. As well, it seems to me, might it be argued that, because the legislature may, at its next session, provide by law that no wooden buildings shall be constructed within certain portions of the city of Milwaukee, except by permission of the Board of Public Works or of the Common Council or by ordinance of the city, that, therefore, a serious question may be raised and argued at length as to whether I own the fee of the lot under the street.

d. If the Water Power Company was so possessed of the south bank and the bed of the stream to its center, with the right to construct such a wing-dam and canal, certainly the state, by the exercise of its undoubted power in the improvement of navigation, forestalled the Water Power Company, and by the erection of the dam in question deprived it of the opportunity of improving and utilizing its water power.

It was argued below by opposite counsel, and I presume the claim will be made here, that the Water Power Company was not, in fact, the owner of any of the water power at the place in question. *First*—for the reason above mentioned, that it had shown no act of the legislature authorizing it to construct and maintain a dam. *Second*—because it had no legal right to cut the bank upon

lots 5 and 6 or either of them for the purpose of taking water from the pond. *Third*—that it did not appear that there was any fall in the river above the government dam upon the land of the Water Power Company.

As to the *second* point, to-wit, that the Water Power Company had no authority to cut the embankment upon the south side of the river for the purpose of taking water from the pond, it was claimed by the Canal Company, upon the argument below, that under the release from Hunt as to lots 6 and 7, it had the absolute control of the south bank upon those lots, and as to lot 5 that it had acquired, under the statute of limitations, if indeed there never had been any grant, or condemnation proceedings, the right to maintain the embankment thereupon to the exclusion of the riparian owner.

It is respectfully submitted that neither the release from Hunt, nor any condemnation proceedings taken for the purpose of acquiring a right to build and maintain *such an embankment* for such a purpose could have passed anything more than an easement upon the lands of the Water Power Company. The necessity for and object of the embankment was to prevent the overflow of the river and escape of the water; it was a mere continuation of the dam up stream upon the surface of the land of the Water Power Company. The right to place it there could only be acquired by purchase or condemnation.

Pumpelly vs. Green Bay & Miss. Canal Co. 13 Wall, 166.

In the absence of express words granting a greater interest, a title in fee will not be implied, either from an instrument of conveyance or from mere user, where an easement only will secure the privilege enjoyed. *Roe et al. vs. Strong et al.*, 107 N. Y. Rep. 350, 359 and 360; *Winch vs. Conservators of the Thames*, 7 L. R. Court of Common Pleas, page 468; Gould on Waters, Sec. 101, page 186, the language of which section is as follows: "If the public acquire the right to use a river bank as a towing path by grant, user or dedication, the title to the bank remains, *prima facie*, vested in the original owners, subject to the public right to use it

as a highway in this particular manner. The banks of a navigable stream may be appropriated by statute to the use of the public as a towing path.

In such case also the riparian proprietors retain the ownership of the soil, subject to the public easement, unless the language of the statute shows an intention to take the fee for the purpose of the act; the rule being, that in the absence of express words, the courts do not infer that a statute of this kind gives to the public or to a board of conservators or navigation companies, acting in the public interest, a greater interest in the soil than is necessary for the purpose of navigation." (See *Conservancy Board vs. Button*, 12 L. R. Ch, Div. pp. 400, 401, James L. J.

The appropriation, by statute, of the banks of a navigable stream to the use of the public as a towing path, referred to in the above quotation, means, by a statute which provides just compensation therefor, as is shown by the cases cited in support of the proposition, and the sentence is not in conflict with *Pumpelly vs. Canal Co.*

The right to maintain this embankment, therefore, being but an easement created for the purpose of improving navigation, the Kaukauna Water Power Company may use its property in any way not injurious to the rights of the public.

Again it does not lie in the mouth of the Canal Company to question this right. It conveyed the improvement, the dams, the locks, and everything essential to the purposes of navigation to the United States, by its deed of 1872, so that, so far as the mere question of invasion of the rights of others is concerned in that embankment, the United States Government is the only party having any right to object. The Water Power Company claims no title to the dam, claims no right to cut the embankment as against the objection of the government, has done so only with its consent, but does claim the right, with the consent of the government, to open its canal out into the pond above the government dam through substantial bulkheads, which, as the case shows, are quite as effectual as was the embankment for the purpose for which it was constructed.

To test this right, suppose that the government should, by act of Congress, discontinue the water-way and absolutely abandon all

navigation of the Fox River, would the Canal Company have any power or authority to maintain this embankment or maintain the south half of the dam upon the land of the Water Power Company? Certainly not under the statute of limitations, because the original entry on the land of the Water Power Company was not adverse. The entry was by consent and by direction of the state, which, for that purpose was the owner; and such entry, which gives no right of action to the land owner, never sets the statute of limitations running. *Jessup vs. Loucks*, 55 Pa. St. 350-361. Certainly not under the act of August 8, 1848, ***because the franchise granted by that act was sold and conveyed to the United States*** and no other party or corporation could resume navigation under that franchise without in some way having acquired it from the government. The only right which the state attempted to perpetuate over this water-way, was reserved to it in and by Sec. 8, Chap. 98 of the Laws of Wisconsin of 1853, under which act the state conveyed the works of improvement to the Fox & Wisconsin Imp. Co. That reservation was as follows: "The state may become owner and proprietor of the works of improvement, at any time after twenty years, upon paying to said association or their assigns, the actual costs expended by said association in the construction of said improvement, over and above the avails of the grant of land made by Congress and applied or received by said company to aid in said improvement."

The twenty years expired in 1873. The state never exercised its right of re-purchase so retained, but, on the contrary, by an act approved March 23, 1871, being Chap. 416 of the Private and Local Laws of the State, authorized the Canal Company to sell and dispose of its rights and property to the government without reservation, as contemplated in the Act of Congress approved July 7th, 1870. Certainly not under the second exception contained in its deed to the United States (page 25, fol. 20, record,) in these words: "Also all that part of the franchise of said company, viz: the water powers created by the dams and by the use of the surplus waters not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto," *unless it* (said Canal Company) *had, prior to that time, in some way acquired title to such water*

powers and legal rights of protection and preservation appurtenant thereto.

Whether it had ever acquired such rights or title depends upon the very question that we bring to this court for decision, and all assertion of such rights and title are but a begging of the question at issue. If the Canal Company had, in 1872, at the date of its deed to the United States, title to the water power of the Kaukauna Water Power Company in question, and had the right of protection and preservation appurtenant thereto, it, perhaps, could except the same from its conveyance, and *by the division of the franchise* retain sufficient thereof as against the state after the abandonment of navigation by the United States to entitle it to maintain the dam in its position, and not to be charged with the perpetration of a nuisance from that time forward. *Certainly, it cannot be seriously claimed that the government, by the transaction in question, is under contract obligations* with the Canal Company, binding it forever to maintain such dams for hydraulic purposes for the benefit of the Canal Company alone, after it may have discontinued navigation. The discontinuance of navigation and its effect upon private rights and ownerships has been considered in different courts and at different times; among other cases, in

Jessup vs. Loucks, 55 Pa. St. 350, 361.
Corwin vs. Cowan, 12 Ohio, St. 629.
Wagner vs. R. R. Co., 22 Ohio St. 363, 579.
McCombs vs. Stewart, 40 Ohio St. 647, 664, 665, 666.
Day vs. R. R. Co., 44 Ohio St. 406, 416.

As to the *third* claim (no fall in the river on land of Water Power Company), the answer to it is that *there is no proof to be found in the record as to how much fall there was in the river above the dam upon lot 5.* The proof is undisputed that the south bank was about three or four feet above the surface of the water at the dam. (Folio 98, page 64, record).

Witness Edwards (folio 99, record), testifies and is uncontradicted that the old dam flowed the river about two miles

above the dam, and that there was not much difference between the flow of the old and new dam. Remembering that the dam was from 8 to 9 feet high, it may be, so far as we can learn from this record, that there was as much as 3 or 4 feet or more fall upon lot 5, and that the flow back to the foot of the rapids, mentioned by witness Edwards, was simply a deadening of the water, without much increase in depth above or up stream from lot 5.

There is no proof to be found in the record tending to show that the Canal Company or the state (except by the Hunt release) ever purchased, or in any way acquired any right to raise the water of the river at any point above or up stream from the government dam. We are therefore left to the inference that the state, exercising its undoubted right in improving navigation, placed this dam in the stream, abutting it upon lands of private owners, raised the water to a height sufficient for the purposes of navigation, without seeking permission (except from Hunt) from any one so to do.

For the purposes of navigation the state, without consent, and without payment of compensation, appropriated the property of the predecessor in title of the Water Power Company upon lot 5, and thus perfected or improved (*as distinguished from created*) upon its land a water power of great value, and it is now claimed that the Water Power Company has no right to the use of it. As to this I may be permitted to quote the language of eminent counsel in *Varick vs. Smith*, 5 Paige 157:

"Whenever the people of the state construct a dam across a river, to divert a portion of the stream for the purposes of the public use, they do not thereby acquire title to the whole water of the stream. And if, in erecting such dam, they improve the hydraulic power of an individual, that individual is entitled to use the same, in its improved state, in any manner which is not inconsistent with the public right of navigation. Such is the rule in relation to land; where a part is taken for the public use, the residue remains to the owner, to be enjoyed and used in its improved state; and that, without making any compensation to the state for the benefit so conferred. The state took for public use one-hundredth part of the water of the Oswego river, which was private property. In taking this, the position of the whole water was changed. This change neither divested the owner of his title to the residue, nor gave the state any right in or to it. The original owner is bound not to use it in a manner which is incompatible with the public use; but he is obliged thus to use it in its changed position, and is not thereby wholly divested of his right."

III.

If the taking of the property of the Water Power Company was for a private purpose, there will be no dispute but that the law of 1848 was void, because in conflict with the provisions of the 14th amendment to the Constitution of the United States.

Osborn vs. Hart, 24 Wis. 89.
Cole vs. La Grange, 113 U. S. 1, 9.
Woodlawn Cemetery Ass'n 11 N. Y. 519-522

That such taking was for a private purpose I will now undertake to demonstrate:

The history of the canal law of Wisconsin (law of August 8, 1848), is given with, I think, accuracy at pages 28 and 29 of my argument filed in opposition to the motion of defendant in error to dismiss for want of jurisdiction. The canal laws of New York and Ohio were, in all essential particulars, so far as power to take private property was concerned, identical with ours. In both of those states the power was limited substantially, as it is here, by what was necessary. Section 15, page 61, laws of the State of Wisconsin, 1848, is as follows:

"In the construction of such improvements, the said board shall have power to enter on, take possession of, and use all lands, waters, and materials, the appropriation of which for the use of such works of improvement, shall in their judgment be necessary."

It would seem almost too clear for argument that this was an absolute limitation upon the power of the state to take and use *only* such waters as should be *necessary* for the successful improvement of navigation; and it would seem almost as clear that when the dam was constructed and a canal excavated, through which to draw water for the passage of water-craft, that whatever water of the river was not needed, and could not be used in the passing of boats through the canal, would naturally flow over the top of the dam and pass on down the stream without interference with, or interruption to, navigation. Such water, it seems to me, cannot be said to be *necessary* for navigation, nor can it properly be said that

the want thereof could be of any inconvenience whatever to the state or those owning the water-way.

It is submitted that the state, like an individual, in the exercise of its power to thus interfere with private rights, should be held to the doing of just as little injury to riparian owners as is consistent with the needs of the public.

The state had the right to place its dam upon the bed of the stream, had the right to raise the same to a height equal with the height of the banks—had the power (after procuring a right of way for its canal, by purchase, gift or condemnation) to take sufficient water from the river for all the needs of navigation, and all without consent of or compensation to riparian owners. The *Black River Improvement Co. vs. La Crosse Booming & Trans. Co. et al.*, 64 Wis. 681, where, citing *Willson vs. Black Bird Creek Marsh Co.*, 2 Pet. 250; *Pumpelly vs. Green Bay & Miss. Canal Co.*, 13 Wall. 166, 181, and other cases, the Supreme Court of Wisconsin says:

"These cases and many others hold the doctrine that the waters in a navigable river, or other navigable body of water, are so far the property of the state that the state may control them for public purposes, in their flow or otherwise, without making any compensation to the riparian owners upon the borders of such streams or bodies of water. The flowing waters in such streams are public highways, and such water-ways are as much subject to the control of the state for the purposes of the improvement of such ways, as a highway upon the land. The right of the public to raise or lower the grade of a public street without being required to compensate the adjacent owners is well established by the decisions of this court, (*Dore vs. City of Milwaukee*, 42 Wis. 108; *Harrison vs. Board of Sup'rs of Milwaukee Co.*, 51 Wis. 645); and the right to discontinue a highway without making compensation has always been recognized by the law. The right of the riparian owner to have the water of a *navigable* stream flow past his lands adjoining the same as they were accustomed to flow, is as perfect against everybody, except the state, or some person or corporation standing in its stead, as it is in the case of *unnavigable* streams; and that right does not, as this court has decided, depend upon his ownership of the soil under the water, but upon his riparian ownership (*Cohn vs Wausau Boom Co.*, 47 Wis. 314, 322); and the right of the state to

control the waters of such streams in the public interest is the same whether the ownership of the soil under the water be in the state or in the riparian owner.

The doctrine of the cases above cited has, as we think, been fully adopted by this court in all cases where the interference with the waters of a navigable stream has been for the improvement of the navigation thereof. Whether this court has decided or will decide that the state may, for any and all public purposes, interfere with the waters of a navigable stream, whereby injury may result to the riparian owner, without making compensation therefor, need not be determined in this case. The plaintiff represents the state for the purpose of improving the navigation of the Black river, and that which it has done under its charter, which is complained of by the defendants, we think must be, for the purposes of this action, considered to have been done for the improvement of navigation in said river. And as against the state, or the plaintiff acting in its stead, we think this court has determined that the riparian owners on the banks of the Black river, or the Black Snake river, have not the absolute right to have the waters of said river flow as they were accustomed to flow in front of or through their lands. See *Wisconsin River Imp. Co. vs. Lyons*, 30 Wis. 61-65; *Cohn vs. Wausau Boom Co., supra; Stevens Point Boom Co. vs. Reilly*, 46 Wis. 237. In the cases last cited the rights of a riparian owner upon a navigable stream, and the power of a state to restrict, limit or take away such rights, were fully discussed; and this court, after mature deliberation, came to the conclusion that these rights are the subject of legislative control without making compensation where they are taken for the purpose of improving the navigation of such stream."

The Fox, according to the complaint, had an average flow at low water of over 150,000 cubic feet per minute, which afforded a water power of over 300 horse power per foot fall (page 2, record), and according to the undisputed testimony of hydraulic engineer Edwards, produced at this dam 2500 to 2700 horse power (page 67, record). The complaint alleges (page 9, record), "that the use of such *surplus* water drawn, and to be drawn from said mill pond, is of great value to this plaintiff, to-wit: of the value of one hundred thousand dollars, to be used on plaintiff's lots aforesaid, and

on such other lands and lots as plaintiff may purchase or as plaintiff may *lease* water to be used upon."

It is hardly to be conceived that the legislature of the State of Wisconsin, substantially copying its canal law from those of the older states mentioned, knowing at the same time that under the constitution of the state there was no power or authority possessed by the state to engage in works of internal improvement, and knowing that the state was prohibited by its constitution from incurring any indebtedness for such purpose, could have intended to take the private property of individuals, for a mere private purpose, and it is only through the construction placed upon the act of 1848 that such a result is accomplished, which construction we bring here for review.

Upon this point, the Supreme Court of Wisconsin, by its judgment now here for review, has decided that by the 16th and 17th sections of the act of 1848, it *was* the intention of the legislature to take *all such surplus water*, and furthermore that such taking was not a necessity, was only a convenience, and that it was a taking for a public purpose. As to both of these points so decided we respectfully submit that the decision of the Supreme Court of the State of Wisconsin is erroneous.

The 16th section of the act of 1848 *upon its face* declares the taking of such *surplus* water to be for a private purpose. "Whenever a *water power* shall be created by reason of any dam erected or other improvement made on any of said rivers, such *water power* shall belong to the state." *Water power*, under the constitutional inhibition in Wisconsin, to be thus created, could not, I submit, belong to the state. They could not be taken by the state except such as may have been actually *created* by use of water necessary for navigation, where no natural water power existed before, which would, in such a case, be in fact but an incident, because water powers, in *their very nature are private property;* they can be made useful and available only by being utilized for hydraulic or manufacturing purposes; *prima facie*, upon the ordinary construction of the language, the taking was for a private purpose, and such water powers were to be subject, after taken, to the future action of the legislature.

The contention of the defendant in error, in the courts below,

was broadly that the state was the owner of the water running in the Fox River, and that, under Sec. 16, it had the power to appropriate all the water of the river to its own use for the purposes of sale or lease, the proceeds thereof to be appropriated to the completion of the improvement. The language of the brief of its counsel below was, first, that it had a grant of the same from the State of Wisconsin, and substantially also from the United States, that the grant by the state was express and direct, that "a glance at the work to be done showed the state that the building of dams to make slack water navigation on the lower Fox would create large and valuable water powers; water powers which the riparian owners could not create, because they had no power or authority to build or maintain dams on this river without legislative grant. The state saw that to spend the fund granted to it by Congress in the building of dams to create water powers for riparian owners, would, in effect, divert the fund to private uses, contrary to the express terms of the trust. Therefore, the state, in fidelity to the trust reposed in it by Congress, enacted that whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water power shall belong to the state.

The state having declared that it would take this title to hydraulic power, finding itself unable to complete the improvements with the aid of this additional fund, transferred the *water power*, with other property, to the Fox & Wisconsin Improvement Company in 1853, in consideration of the release from its contracts and the payment of its debts to the amount of some two hundred thousand dollars, and the performance of the trust it had assumed."

Counsel then proceeded: "Here, then, is a direct express grant from the state on the most valuable and sacred consideration * * * * The value of these water powers had before this gone into this improvement * * * The work had cost a million dollars more than all receipts from lands, tolls, water rents, water powers and all other receipts."

I thus refer to the argument below to recall the fact that the defendant in error claimed, and I suppose still claims, that these water powers when thus developed belonged to and were within the gift of the state, that their value was necessary to the construc-

tion and completion of the improvement; that it was the intention of the legislature to take the same for the purpose of *leasing or sale*, and to expend the proceeds in the completion of the works of improvement. This is exactly what the Supreme Court of Wisconsin has effectuated by its judgment in this case in holding that the water was practically indivisible.

The court, in its opinion, substantially admits that, but for the fact of *indivisibility*, the taking of the surplus water would be a taking for a *private* purpose.

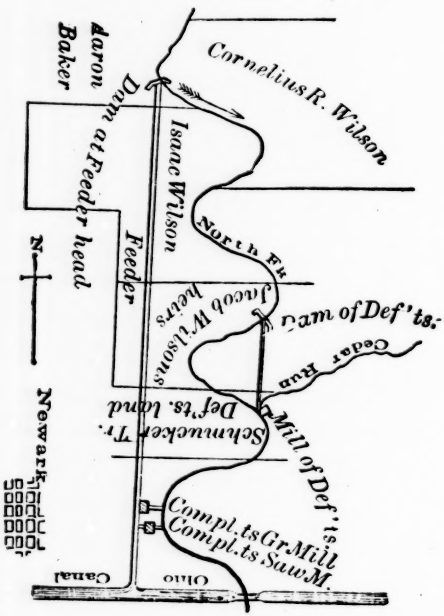
The courts of New York, Ohio, Michigan and Maryland have had the same, or very similar questions before them, and, as I understand their decisions, have reached conclusions entirely different from those reached by our Supreme Court in this case, and I respectfully submit more in consonance with justice and correct legal principles.

Buckingham, et. al., vs. Smith & Dille, 10 Ohio 288, was a suit in equity by lessees of the canal commissioners of Ohio, against land owners (through whose lands ran the stream which supplied the canal there in question with water), *inter alia*, to restrain such owners from further prosecuting an action *at* law, before then commenced against them (said complainants), for damages for diversion of water through the canal feeder, away from the natural stream, lands, and mill of the plaintiffs in the suit at law. The defendants in the action at law (complainants in the suit in equity) justified or claimed the right to so divert the water, by virtue of a certain lease to them made by the canal commissioners, which they (the said complainants) insisted gave them the right so to divert the water.

The canal law of Ohio, under which the water was taken, was enacted in February, 1825, and those parts which provided for condemnation were almost identical with sections 15, 16 and 17 of our act of 1848, *with this marked distinction*, that in case of disagreement with land owners, the commissioners should, *on application of the owners* of such lands, waters, etc., appoint appraisers, etc. (see 4 Ohio, pp. 262, 266, for statement of the act.) One section, either 8 or 9, authorized the commissioners to take possession of the lands, waters, streams, and materials *necessary* for the prosecution of the work, similar to section 15 of our act of 1848.

Another section (I think it was 9, either 8 or 9), provided, "that in case any lands waters, streams or materials taken and appropriated as aforesaid, shall not be given or granted to this state, then the canal commissioners shall *on application of the owners of such lands, waters*, etc., appoint appraisers who are required to take an oath, and to appraise the loss or damage, if any, of the owner of the premises so required for the purpose aforesaid, which, when paid, etc., should vest in the state the fee of the premises so appropriated."

The case was argued at great length by distinguished counsel, and the decision, as it seems to us, squarely covers the question now presented to this court. A diagram showing the location of the lands, of the stream, the feeder, and canal, is to be found at page 289 (10 Ohio), and is here re-produced.



The court, after showing that the lease gave, and *could only give what the state had acquired* (p. 296), proceeds to show *what the state could*, and *what it could not*, acquire by condemnation. "But suppose the acting commissioner had assumed to sell all that the

complainants charge in their bill that they believe was conveyed, would it lay the foundation for relief against the respondents? It is clear, nothing would have passed by such a sale but what the complainants have acquired.

The state, notwithstanding the sovereignty of her character, can take only sufficient water from private streams for the purposes of the canal. So far the law authorizes the commissioners to invade private right, as to take what is necessary for canal navigation, and to this extent, authority is conferred by the constitution, provided a compensation be paid in money to the owner. (297.)

The principle is founded on the superior claims of a whole community over an individual citizen; but then in those cases only where private property is wanted for *public use* or demanded by the *public welfare*. We know of no instances in which it has or can be taken, even by state authority, for the mere purpose of raising a revenue by re-sale, or otherwise; and the exercise of such a power would be utterly destructive of individual right, and break down all the distinctions between *meum et tuum* and annihilate them forever at the pleasure of the state (5 Ohio, 392). The uses of the waters of private streams belong to the owners of the lands over which they flow. 4 Ohio 253 Kent. Com. 344. (11 ed. * 439, pages 560 and 561). They are as much individual property as the stones scattered over the soil. If such streams can be passed with boats and rafts, the public has the right of passage; but, subject to such easement, the owner of the land may appropriate the use of the water in his own discretion, taking care not to flow it on the proprietor above, and to return it to its natural channel before it leaves his own lands. (8 Eng. Com. Law 371.) It follows, if such waters should be taken by the state for the mere purpose of creating hydraulic power, and rented to an individual, the transaction would be illegal, and no title would pass as against the owner. In conducting the water through the feeder, a discretionary power must necessarily rest in the agents of the state, and in making provisions for a supply, it must frequently occur that a surplus will accumulate, and it was the right to the use of this surplus water which the lease conveyed."

In the above case the feeder was supplied with water by a dam across Mad river *above* the lands of the defendants in the suit in

equity (plaintiffs in the suit at law), and no doubt it was possible in a dry season, that all the water of the river would be required and could be turned into the feeder to supply the canal.

Therefore the same interferance with the control of the water and river by the state was there possible, nay more, probable, which was in the opinion of the court below, supposed to be controling in determining how much water the state actually did take.

It is stated (page 296), that the complainants took under their lease all the surplus water which the state took or had any constitutional power to take. True, it also appears that before the lease was made the canal commissioners had come to the conclusion that it was doubtful whether the state could condemn *all* of the surplus water, and so, for greater caution, limited in the lease the amount, to the extent of the interest of the state.

This question is embarrassing, because if, as suggested by the court below, the Water Power Company should make its claim against the United States for damages for the taking of this, its surplus water power, we doubt not the answer will be *that neither it nor the state ever took the whole water of the river at this dam for the purpose of navigation.* We do not suppose that the judgment of the state court, in an action in which the government was not represented, would be *res adjudicata* upon the question, and therefore the United States could treat the question as still open.

In the case of *Cooper vs. Williams*, 5th Ohio, 392, the court, passing upon the same canal act, says:

"The canal commissioners are authorized to take private property for the use of that work, but it must be done in such a manner as to do the proprietor no unnecessary damage. It is for the purposes of the canal alone that they can take it. And if they attempt to go beyond this, *it is within the jurisdiction of this court to restrain them.*

Although the law authorizes them, in some cases, to dispose of the water for hydraulic purposes with a view to raise a revenue to aid in defraying the expense of this work, still this relates only to the water which is necessary for the navigation of the canal, and which can be used for these other purposes without interfering with that navigation. *It does not authorize them to receive a surplus quantity of water into the canal*, that they may dispose of it (italics are

mine), especially when an injury should be thereby done to an individual. Private property can only be taken by the government or its agent when necessary for the public welfare, and in such case compensation must be made. A riparian proprietor possesses the same right to the use of the water flowing through his land that he does to the land itself.

The water itself is not his. It is the use. And in this use he cannot be disturbed by an adjoining proprietor either above or below him. * * * (Page 393).

Of this right he may be deprived if the "public welfare" require it, so far as that public welfare does require, he first having been compensated for the injury.

When the water was taken from the river at Dayton to feed the canal the complainants were deprived of a right, and for this they did, or might have received a compensation. But they cannot follow this water in the canal and make use of it for water works wherever a convenient site may offer. And this because they have no exclusive property in the water, but in its use while flowing over their land. When withdrawn from the river, its natural channel, and flowing in the canal, this use is vested in the state, and may be disposed of by her agents, so that the navigation is not impeded.

But as the public welfare does not require that any more should be withdrawn from the river than is necessary for the navigation of the canal, no more can be taken; and should an attempt be made to take more this court might prevent it by injunction."

The above case was first reported in the 4th Ohio, 251; was a bill filed by a land owner through whose land the Mad river ran, against Williams, acting canal commissioner, to restrain the commissioner from consummating a sale of water power from a feeder, *after the water necessary to supply the canal had been let into the feeder and before the water reached the canal.*

There was sufficient fall between the dam across Mad River above complainant's land, and the canal, to furnish a large and valuable water power, the use of the water being merely *utilized* on its way from the river through the feeder to the canal. (Page 254).

The feeder ran mostly through the complainants' land, but at one point ran onto the lands of a third party, and then again returned onto the lands of the complainants and discharged into the

canal. The ancestor of the complainants had, prior to the location of the canal, utilized the water of Mad River in propelling his own mills. The Canal Commissioners, for reasons satisfactory to themselves, proposed to change the route of the feeder, *taking or diverting no more water* from the river, and to sell the use of the water *thus on its way to the canal* to other parties, to be used at the point where the feeder passed over the land of others.

It was shown that 3000 cubic feet per minute would be necessarily drawn from the river through the feeder to supply the canal; the commissioners proposed thus to sell only 2000 cubic feet per minute, and the court held that it was an authorized act; that it imposed no new burden upon the complainants—that it only utilized the water while on its way through the feeder to the canal—was merely incidental to the improvement, and that such water power was, in short and in fact, *created* by such surplus water as was intended by the law there in question; and, as I maintained before the court below, was intended by the act of August 8th, 1848; and it still seems to me that such water power thus created by water after being abstracted from the river, in addition to that which might be developed upon state lands granted to aid in the improvement, is all the water power ever contemplated or intended by Sec. 16 of the act of 1848, and if our court could have thus construed that act, no conflict with the provisions of the constitutions of the United States would have resulted, and private rights would have been respected.

Varick vs. Smith, 5 Paige 137, was before the court upon demurrer to the complaint.

The question was between land owner, Varick and Smith assignee of ~~and~~ lessee of canal commissioners, of water power created under a similar general law of the State of New York which specified no definite or specific amount of water.

The Vice Chancellor (page 146), says: "Nor can I find that the acts of 1823 and 1825 on the subject of hydraulic privileges, contain any provisions which can be fairly construed as taking away the rights of individuals except for public use. * * * It would be doing injustice to the legislature which passed these statutes, to put a construction upon them that would work unnecessary wrong to private rights. Water power was not to be

created for the purpose of vending or leasing. It might by diversion or damming, be incidently created; and in such a case provision has been made for disposing of it by lease. On any other construction the legislature might be accused of doing what they certainly never intended to do, of taking the property of one citizen and selling it to another." (Read the whole page.)

The demurrer was overruled by the Vice Chancellor, (page 151) whose decision was affirmed, upon appeal, by Chancellor Walworth. (Pages 158–159.) In deciding the case he there uses the following language:

"But whatever remains of the stream, beyond what is wanted for the public improvement and which continues to flow over the dam and down the original channel of the river, unquestionably belongs to the owners of water rights upon the margin of the stream below, in the same manner as if the state dam had not been erected."

Afterwards the defendants answered, denying the complainants title to the water privileges claimed; the cause was tried upon the merits, before the Vice Chancellor who granted *inter alia* a perpetual injunction against using such surplus waters by taking the same from or through the state dam. *Varick vs. Smith*, 9 Paige, 548. This last decree was affirmed by Chancellor Walworth, upon appeal, who, in deciding the case used, *inter alia*, this language (pp. 567, 568):

"The patent from the state for lot No. 7, under which the complainant has derived his title to the lands adjoining the dam and for some distance below the same, by legal construction conveys the *alveus* or bed of the river to the center of the stream * * * * the complainant under the grant was therefore entitled to the water and water privileges which were naturally connected with those water lots * * * If the waters which were not wanted for the use of the public, and which naturally flowed over the dam and down the original channel of the river, therefore, were of any benefit to the owner of these water lots, or could be used by such owner without interfering with the public right of navigation, the complainant obtained the prior right by virtue of such purchase."

This case has never been overruled, and is approved and followed in *Smith et al. vs. City of Rochester*, 92 N. Y. 463, 473, the first four head notes of which case are as follows:

"1. Riparian owners of lands adjoining fresh water and non-navigable streams, take title to the thread of the stream and as incident to the title ac-

quire the right to the usufructuary enjoyment of the undiminished and undisturbed flow of said stream.

2. This is so, also, as to the fresh water navigable streams and small lakes within this state, where the tide does not ebb and flow, save that the public has an easement in such waters for the purpose of travel, as on a public highway, which easement, as it pertains to the sovereignty of the state, is inalienable, and gives to the state the right to use, regulate and control the waters for the purposes of navigation.

3. This public easement gives the state no right to convert the waters, or to authorize their conversion, to any other uses than those for which the easement was created, *i. e.*, for the purposes of navigation.

4. The right to divert the waters for other uses, although public in their nature, can only be acquired under and by virtue of the sovereign right of eminent domain, and upon making just compensation."

The action was brought by owners and lessees of mills situated upon the bank of Honeoye Creek, to restrain defendant from diverting the waters of Hemlock Lake from said creek.

The somewhat confused condition of the law of New York as to the rights of riparian owners upon navigable streams, is therein examined into and explained and cases distinguished and limited. The principal discrepancy being shown to grow out of the peculiar doctrines of the civil law as applied to the Hudson and Mohawk Rivers. The sixth headnote, stating the distinction, is as follows:

"The rights of riparian owners upon the Hudson (aside from its tidal character) and the Mohawk Rivers, are affected by the doctrines of the civil law, prevailing in the Netherlands, from whose government they were derived, and are distinguishable from the rights of riparian owners upon other navigable waters of the state."

The next case to which I call the attention of your Honors, is *Kane vs. the Mayor, etc., of Baltimore*, 15 Maryland 240, the head notes to which are as follows:

"Under Art. 3, Sec. 46, of the constitution, the legislature cannot take or confer on any municipal or other corporation the power to take private property for any other than public use.

The act of 1853, ch. 376, authorizes the city of Baltimore to purchase, or acquire title to property by condemnation, *not* for all purposes, but for "the purpose of conveying water into said city, for the use of the said city and for the health and convenience of the inhabitants thereof.

Under this act the city may acquire, by condemnation of the bed of a stream, or water course, a right to the use of the water in perpetuity, but the use must be the one specified in the act.

Such a condemnation confers on the city the use and occupation of the stream for the purposes mentioned in the act, but leaves in the owner all such use of it as does not injuriously interfere therewith.

The owner has the right to use the water in the manner it has been customary to use it, at his mill built on the stream so condemned, so far as that use may not interfere with the use of the same by the city authorities for supplying the city with pure water."

The above was a suit in equity by land owner to restrain the use by the city of more water than was necessary for the public purpose for which condemnation was authorized.

The constitution of Maryland, as appears from the opinion (page 249), is the same as that of Ohio, Wisconsin, New York, Illinois and most of the other states in this regard. The language of the act authorizing the taking, is similar to that of the Wisconsin act of 1848.

The Maryland court (page 249, in case above cited) says: "The act of 1853, chapter 396, authorizes the city by purchase, or in case of inability to purchase with consent of the owner, to acquire title by condemnation of a jury, and the tender of, or payment of the valuation; but this authority is not given to the city for all purposes, but for the purpose of conveying water into the said city, for the use of said city, and for the health and convenience of the inhabitants thereof. Under this privilege the city can acquire a right to the use of the water in perpetuity, but the use to which it is to be applied must be the one specified. In our opinion it is not competent for the legislature to confer on the city of Baltimore, or other corporation, the power to take private property for any use but a public one, and the particular public use in this case, is described fully in the Act * * * the conveyance of water into said city."

"The legislature could not confer on the city a larger power than it possessed. The right of eminent domain, which under the act of 1853 was, in part conferred upon the city, cannot be more extensive than as it existed before the grant. The state has not, and therefor cannot confer, a power to take private property for any but a public use. In our opinion it has not done so in the present instance.

We think the complainant has the right to use the water in the

manner it has been customary to use it at his mill, so far as that use may not interfere with the use of the same * * * for supplying the city with pure water."

The last case, in point of time, which we have found is —

Re Barre Water Co. 62 Vermont 27. S. C. 20 Atlantic Rep. 109.

I submit to your Honors that this is the only logical disposition of such a question in a jurisdiction which affirms that the absolute ownership of the beds of navigable streams is, *prima facie*, in the owners of the banks; and I respectfully add that I can see, in this case, no reason for refusing to follow such holding to its logical results.

IV.

THE LEGISLATURE NOT THE ULTIMATE JUDGE OF HOW MUCH WATER IS NECESSARY.

In *Silsby Manufacturing Co. vs. State of New York*, 104 N. Y. page 567, the doctrine is stated as follows:

"The state had a right to all these waters for no other purpose than that of navigation, and only so much as should at all times be necessary for such purpose. We do not see upon what principle it can be said that the state was to be the sole judge of that necessity and of the amount to be taken. It succeeded only to the rights of the lock company, and it has not since acquired any other or different rights. If it desired more it could easily acquire more by the exercise or its right of eminent domain, but so far its rights must be decided as they exist in its character as successor to the rights of the lock company.

We do not believe that it ever would have been contended that the company was the sole judge of the amount necessary for its pur-

poses of navigation. Undoubtedly the acts of the agents of the state in the use of the water, would be entitled to a quite liberal construction."

To the same effect is *Kane vs., The Mayor, etc., of Baltimore*, 15 Maryland, 240, above cited. See also Cooley on Const. Limitations (5th ed), page 666. *Smith vs. Gould*, 59 Wis. 641-642.

Bankhead vs. Brown, 25 Iowa 540.
C. R. I. & P. R. R. vs. Town of Lake, 71 Ill. 336.
Tyler vs. Beacher et al., 44 Vt. 648-651.
Mills on Eminent Domain, § 10, pages 93-94.
Lewis on Eminent Domain, § 158, page 216.

Chicago &c Ry Co. v Minn. 134 U. S. 418.
Minneapolis &c Ry Co. v Minn. 134 U. S. 418

So far as the acts of the agents of the state in this case are concerned, they show *no taking* of the water appurtenant to the south side of the river, and the same has never, in fact, been taken or used by the defendant in error or those under whom it claims. At the foot of page 56 of the record is the following: "Stipulated, that the Fox & Wisconsin Improvement Co. leased about ten per cent. of the water power at the Kaukauna dam, all on the north side and none on the south side." That covered a period of time from 1853 to 1866, at which last mentioned date the present Canal Company was organized and went into possession. (See complaint, page 7, last part of folio 6, record.)

The Canal Company never used one-half of the surplus water at the Kaukauna dam. (See page 67 record). Edwards, hydraulic engineer, and witness on behalf of the Canal Co., testified that they had used, on the government side of Kaukauna, up to the time of the trial, 1200 to 1500 horse power; that from 3500 to 4000 horse power of water was furnished by the government dam at Kaukauna, *taking the fall down as far as the first lock of the canal*, provided all the water was carried through the canal. That the upper lock of the canal *is 2300 feet* below the head of the canal. That there is a pretty sharp fall part of that way. That he figured the head at the upper lock 12 to 14 feet. That right at

the dam the head is nine feet or eight and one half, and the whole flow gives from 2500 to 2700 horse power *there*.

As no water was drawn *at the dam*, but such as was used was drawn 2300 feet down stream, and where there was a head of some four feet more than at the dam, creating a power of from 3500 to 4000 horse power *where drawn*, shows, beyond question, that the Canal Company never, in fact, used one-half of the water power of the river. And it is further thus shown that the only taking of water appurtenant to the south side thus far, has been *theoretical* that is to say, *by the judgment of the court below brought here for review*.

V.

THE SURPLUS WATER POWER WAS NEITHER NECESSARY OR CONVENIENT FOR THE PURPOSES OF NAVIGATION.

We come now to the consideration of the ground upon which the Supreme Court of Wisconsin decided that by the building of the dam, and the constructing, upon the north side of the river, of a canal, the state *theoretically* took and appropriated to its own use all of the water power of the river at that point. The court, page 89 record, says: "It was of vital interest, therefore, to the state, that it, or the corporation to which it entrusted the preservation and maintenance of the improvement, should have the entire and absolute control of the dam, embankments, canals, and all appliances necessary for the purposes of navigation, as well as of the waters in the pond created by the dam. It would be a serious detriment to the public interests were each riparian owner entitled to cut the dam or the embankment, which is a part thereof, and draw water from the pond. The exercise of such a right might, and probably would, seriously interfere with the proper management of the improvement, greatly to the detriment of the free and unrestricted navigation of the river."

The plaintiffs in error admit that it was of vital interest to the state, and to those entrusted with the preservation and maintenance

of the improvement, that they should have the *entire control* of the dam, embankments, canals, and all appliances necessary for the purposes of navigation, as well as of the waters *necessary* for *navigation* in the pond created by the dam. But they deny that the *absolute control* of such water involves the *ownership or the right to the use* of the surplus over and above what is necessary for the purposes of navigation. They deny that the *surplus water power* is either necessary or convenient for the purposes of navigation. Here again comes in, and properly I submit, the doctrine of practical construction. Neither the State, the Fox and Wisconsin Improvement Co., the Canal Company, or the United States Government, have ever found it necessary, or even convenient, to apply the whole water of the river to the purposes of navigation. Mr. Martin, the contractor, testified, and it is uncontradicted (page 74, folio 117, record), as follows: "We made a canal and put in a *guard lock* on the north side, and the dam which I afterwards put in was built from that guard lock across to the other side of the river." Edwards testified (page 62, folio 95, record), in these words: "The old dam was nearly opposite and little below the original *head gates* to the entrance of the government canal."

The Canal Company was authorized to convey to the government, the improvement, dams, canals, locks and appliances, and upon such conveyance, *by words*, excepted and retained such water powers or surplus water as it then, in law, was the owner of; and from thence hitherto has, in fact, used a portion of such surplus water, drawn from the government canal, and, so far as is shown by this record, without any inconvenience either to itself, the Canal Company, or to the government.

The placing in the mouth of the government canal, by the state or the Fox & Wisconsin Improvement Company, of a *guard lock*, as called by Mr. Martin, or *head gates*, as designated by Mr. Edwards, shows that it was practicable to exclude from the canal all *the water not needed* for navigation, which water, when so excluded, would naturally pass over the dam and down the river as in a state of nature. No riparian owner could lawfully cut the dam or interfere with it in any way without the consent of the state or government in charge; nor can any water now be taken, even by the

Canal Co., from this same canal, if it interferes with navigation. The dam may be removed by the government from the bed of the river and another one inserted in its stead; the canal may be either enlarged or diminished in size or capacity, and even the Canal Company itself cannot complain or object except as a riparian owner of the lands abutting the dam, and upon which the canal is constructed on the north side of the river at this point, if indeed it is the owner since its sale to the government, of such land upon the north side, which is not admitted.

The authorities are numerous upon the question of what is *necessary*, and what is *merely convenient* for public use, and the effect, in either case, upon the right of the public to take *in invitum*, to some of which I will now call the attention of the court:

In *Consolidated Channel Co.* vs. *The Central Pacific R. R. Co. et al.*, 51 Cal. page 269, it was sought to procure, by condemnation, certain lands belonging to the several defendants to serve as a site for a bed rock flume, to carry the dirt and gravel from its mining claims; and also as a place of deposit for the tailings and refuse matter from its claims. The statute, under which the proceeding was commenced, provided that the right of eminent domain might be exercised in behalf of certain enumerated public uses, among others, tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from the mines.

The court (page 272) said: "It is not competent for the legislature to authorize the levy of a public tax, or the taking of private property for the encouragement of a purely private industry."

But it was contended by counsel for the plaintiff, that the statute referred to *was a legislative declaration* that the construction of ditches, flumes, and dumping places for working mines, are *public uses* in behalf of which the right of eminent domain may be exercised; and they invoked the doctrine that the judgment of the legislature upon such questions was conclusive, and not open to review by the judicial department of the government. The court said (page 273): "Without doubt it is the general rule that, where there is any doubt whether the use to which the property is pro-

posed to be devoted is of a public or private character, it is a matter to be determined by the legislature, and the courts will not undertake to disturb its judgment in this regard. This question was fully discussed and the doctrine established in the case of *S. & V. R. R. Co. vs. City of Stockton* (41 Cal. 147), but, in the same case, an exception to the general rule is recognized—it is said: A case might indeed be presented, in which it might appear, beyond the possibility of a question, that a tax had been imposed, or the property of a citizen had been taken, for a use or purpose in no sense public; or, in the language of Chancellor Walworth (5 Paige 159.) 'Where there was no foundation for the pretence that the public was to be benefited thereby,' and in such a case it would be our duty to interfere and afford relief." The case cited above from 5 Paige is *Varick vs. Smith*, one upon which I especially rely.

In Waddell's Appeal, 84 Penn. St., page 90, it was contended, by counsel in argument for the defendant, land owner, that the act under consideration was unconstitutional, because the taking of private property by the terms thereof, was based neither upon the public use nor necessity, and again, that what was a public use was a question for the courts and not for the legislature. That the *constitution*, and not the laws, is supreme. The constitution as expounded *by the courts* and not by the legislature. The Supreme Court adopted the views of defendants counsel, and affirmed the decision of the court below, continuing the injunction granted by it.

In *Savings and Loan Association vs. Topeka*, 20 Wall. 655, this court held:

"1. A statute which authorizes towns to contract debts or other obligations payable in money, implies the duty to levy taxes to pay them, unless some other fund or source of payment is provided.

2. If there is no power in the legislature which passed such a statute to authorize the levy of taxes in aid of the purpose for which the obligation is to be contracted, the statute is void, and so are the bonds or other forms of contract based on the statute. * * *

8. A statute which authorizes a town to issue its bonds in aid of the manufacturing enterprise of individuals is void, because the taxes necessary to pay the bonds would, if collected, be a transfer

of the property of individuals to aid in the projects of gain and profit of others, and not for public use, in the proper sense of that term."

I respectfully submit that the avowed purpose of taking water power under the Wisconsin act of 1848, is just as plainly a taking for a private purpose as was that declared in the three cases last above cited. The use of the water power was not for the public—it was not declared by the act to be for the public, but it was appropriated by the state and for the state, and yet the state had no constitutional authority to have it, except for the purpose of navition. If the state was not required or authorized to retain it for, or furnish it to, those who might apply for it, but was at liberty to sell or lease it to whom it pleased, it seems to me that the use must be strictly private. In *Olmsted vs. Proprietors of Morris Acqueduct*, 47 New Jersey Law Rep., page 331, the court says: "If no obligation rested upon the Water Company to supply, on reasonable terms, all who applied for water, the use would be strictly private. The duty of furnishing the public with water must be present to make it of a public character. * * * (page 332). The true criterion by which to judge the character of the use is whether the public enjoyed it of right or by permission only."

When the title acquired may be freed from public use, it cannot be obtained by the exercise of the right of eminent domain.

Mills on Eminent Domain, Sec. 22, page 110.
Oregon Ry. etc. Co. vs. Oregon Real Estate Co., 12 Oregon 445.
Chagrin Falls & C. P. R. Co. vs. Kane et al., 2 Ohio State, pages 426-427.

In the case last cited the question was as to the power of a Plank Road Company to take private property for its use, by condemnation. At the foot of page 426 the doctrine which I contend for is stated in the following language: "The owners retained the fee of the land subject to the easement, and the right to use it in any manner not inconsistent with the full and perfect enjoyment by the

public of the interest acquired by it, so long as it continued to be used for that purpose.

As the interest of the public was acquired for defined objects, and specified purposes, it seems very clear that the land could not be diverted to other purposes or used in a manner substantially different from that for which it was appropriated, without relieving it from the incumbrance, and restoring the owner to the absolute dominion he had before it was taken."

In *Nashville & C. R. R. vs. Cowardin*, 11 Humphrey, 348, it was held that the railroad company had no power to take lands by condemnation for purposes of storehouses, houses for agents, workshops, etc., which were not necessarily required to be contiguous to the road, for the reason that they were only *conveniences* which might as well be situated elsewhere as upon the line of the road; that the company had power and authority to own all such conveniences, *but it must rely on negotiation or donation for obtaining the same.*

In *Memphis Freight Co. vs. Mayor, etc.*, 4 Coldwell's Rep., page 419, the second head note is as follows:

"For public uses government has the right to exercise its power of eminent domain, and take private property, giving just compensation; but for public *convenience*, it has not. A public convenience is not such a necessity as to authorize the exercise of the right of eminent domain."

The court, page 424, citing *West River Bridge Co. vs. Dick, et als.*, 6 Howard 547, says: "It is not enough that there is an act of incorporation for a bridge or turnpike or railroad to make them public, so as to take private property constitutionally, without the owners consent; but their uses and objects must be the use of the public, and must, in their essence and character and liabilities, be public within the meaning of the term public use."

At page 425 the court says: "There is a distinction between a public use and public *convenience*. To authorize the taking of private property for public use, the use must be for the people at large—for travellers, for all; and must also be compulsory by them and not optional with the corporators—must be a right by the people and not a favor—must be under public regulations as to tolls, etc., etc.; 6 Howard, 546, 3 Kent, 270; but where it is a

public convenience, not a necessity, the right to take private property does not exist."

In the case last cited, the object of the company was much more nearly for a public purpose than in the cases above cited from California and Pennsylvania. And it was there also insisted that it was within the exclusive province of the legislature to determine whether the purpose or object for which the property was to be taken was for public or private use; but the court refused to so hold, and decided that the act there under consideration was unconstitutional and void.

Wherever the taking of private property for public use is provided for by a general law, *which does not itself describe the property to be taken*, the question whether the use is public is for the courts to determine in each individual case as it arises. In Wisconsin, in the absence of a statute giving greater right, the title in fee to public streets and highways remains in the owner, the public taking but an easement for the purposes of passage and re-passage, *and such other public purposes as have, from time to time, been engrafted upon the use by the decisions of the courts of the state*, among others, the right of the public to appropriate such streets and highways to the use of street railways propelled by horse power. (See *Hobart vs. The Milwaukee C. R. R. Co.*, 27 Wis. 194.) Yet no court has thus far held that the use, by such companies, of a right of way over the surface of streets was of such a character as to render its exercise incompatible with the existence or continuance of the fee in the original owner. In many cities, streets upon which such railways have been constructed are so narrow that the railway tracks very much discommode travel in the ordinary way, *i. e.*, upon foot and in private vehicles, rendering it, in many instances, almost, if not quite unsafe, and yet it has never been suggested in Wisconsin, at least, not to my knowledge, *that, therefore* the state became the owner of the fee. No one doubts that the State, in cases of such mixed occupation would have the absolute control and direction as to how the use of the surface of the street should be divided between the owner of the fee, the general public, and the street railway company. (*Town of Palatine vs. Kreuger*, 121 Ills. 72-75.) The right to control *that use* is part of the police power of

the state and cannot be legally parted with. It is the same power which the State or the United States exercises over the waters of the Fox River, considered as a public highway, as against riparian owners, as well as against those navigating its waters.

Again, it is held in Wisconsin that railways for traffic, the cars of which are propelled by steam, may take, by condemnation, for right of way, public streets or highways, upon payment of just compensation, and in the absence of statutory provision giving a greater right, it is admitted on all hands that they take but an easement, and the circumstance that the passing of trains over streets and highways thus condemned and appropriated makes it inconvenient and sometimes dangerous for the public to use such streets and highways in the usual manner, has never been considered a reason why it should be held by the courts that an absolute title in fee must necessarily be vested in such companies as an incident to the right to take and condemn for their ordinary purposes.

With as much propriety, and quite as much force, might it be argued that railroad companies, appropriating streets and highways for the purposes of travel and traffic, should, as an incident, be held to take title in fee to their several rights of way, as that the state should be held to have taken the absolute ownership and right to the use of all of the water of Fox River, over and above what might be necessary for navigation.

All of the facts bearing upon this question are set out in the record, and the court below does not seem to disagree with us as to the fact that the use, for hydraulic purposes, is, *prima facie*, private, it could not well come to any other conclusion, in view of the declaration of the court in the Eau Claire case. (40 Wis. pp. 540–41.)

It there declares that a statute which authorized the erection of a dam at public cost across a navigable river, *either* for the purpose of water works for the city, *or for the purpose of leasing* the water power for private purposes, was unconstitutional and void, because the power so granted was alternative and optional, *either* for a public or private use, thus leaving it possible to be used for *private* purposes solely. But the court below distinguishes the case at bar upon its peculiar facts, and holds, contrary to the New York, Ohio and Maryland cases cited, and in direct opposition to all of

the facts shown by the record that all of the surplus water power is a mere *accidental excess*, an *unavoidable incident* to the power to construct and maintain the dam, and that such surplus water is *practically inseparable* from the water necessary for the purposes of navigation. This conclusion is supported by two adjudicated cases *only*, that is to say, *The State vs. Eau Claire*, 40 Wis., 533 and *Spaulding vs. City of Lowell*, 23 Pick. 71. *In neither* of which, I submit, was involved the proposition in support of which they are cited.

In the first place, it is to be observed that the city of Eau Claire was not prohibited by any constitutional provision from engaging in works of internal improvement, as is the state of Wisconsin, and I submit that it might be necessary for that reason, to place an entirely different construction upon the same words when used with reference to those different municipalities or public corporations.

In the next place, it is to be observed that the *Eau Claire case* came into court upon an information by the Attorney-General of the state, asking on behalf of the state for an injunction against the city of Eau Claire, its mayor, etc., restraining them from entering upon the construction of the works or issuing of bonds in aid of the proposed undertaking.

The Chippewa River, within the city of Eau Claire, was navigable to a limited extent, and the dam authorized by the act was thereby required to be so constructed as not to materially obstruct the navigation of the river. There was no averment in the information, (page 542, 40 Wis.,) that the dam or water power authorized was disproportionate to the purpose; the information avered only that the city was about to execute the power, and that the construction of the works authorized *would interrupt and prevent the navigation of the river*. The court said: "The averment is therefore directed, not against the execution of the power by the authorities of the city, but against the power itself, as granted by the legislature; * * * (p. 543) the question before us is, whether we shall arrest the execution of the work authorized by the legislature to be so constructed *as not* to obstruct navigation, upon the ground that the work so authorized *will* obstruct navigation. * * * For the purpose of this motion we must consider

the statute as a valid grant of the power. No abuse of the power is alleged; and we cannot enjoin its use.

It was objected to the statute that it provides for no compensation for lands which may be overflowed by the dam. It is enough to say here that there is no averment in the information that any lands will be overflowed. The Chippewa, where the dam is authorized, is understood to be a peculiar river; and it is quite possible that there may be no overflow. * * * We only hold that, in the present state of this cause, we do not feel at liberty to enjoin the execution of the legislative grant of power."

The case was before the Supreme Court, as a court of original jurisdiction, (which jurisdiction it might, under the constitution of the state of Wisconsin, exercise in certain cases,) for an injunction to restrain the city of Eau Claire from proceeding with the erection of the proposed water works. The motion was denied for the reasons above briefly set forth.

It is submitted that, *upon such a complaint, between such parties and for such purpose alone*, no question at issue in the case at bar could properly *be there* considered. *Bell vs. City of Platteville*, 71 Wis. p. 144. For aught that appears in the case, the city of Eau Claire might have owned the bed and banks of the river; it certainly had the power to acquire title thereto, either by purchase, lease, or donation, for the public purpose expressed in the act. Section 18, of chapter 2 of its charter, being chapter 16 of the Private and Local Laws of Wisconsin for the year 1872, (page 81) is in these words: "Said city may lease, purchase or hold real or personal property sufficient for the convenience of the inhabitants thereof, and may sell and convey the same, and the same shall be free from taxation while owned and held by said city."

By section 1, chapter 5, of its charter, p. 47, P. & L. Laws of 1872, it was provided that the Common Council should have power to lay out public squares, grounds, and alleys, and widen the same, and to make all necessary and proper improvements within the limits of said city, in the manner therein provided; and by subsequent sections of the same chapter it was provided that private property might be taken for such necessary public improvements in the manner therein provided, and upon payment of just compensation therefor.

By subdivision 11, of chapter 4 of its charter (page 43, P. & L. Laws of 1872), the Common Council was authorized, among other things, "to provide for the erection of water works for the supply of water to the inhabitants of the city."

By the last section but one, of the charter, being section 36 (page 85) it was negatively provided in these words: "Nothing in this act contained shall be construed as authorizing the erection of dam or dams across the Chippewa River within the limits of said city," and this prohibitory section seems to have been the occasion for the enactment of the special acts of 1875 and 1876 mentioned in both the Eau Claire cases.

Thus it appears that the city had authority, under its charter, also to become the owner of the bed and banks of the Chippewa River, by and through condemnation proceedings, and in whichever way it entitled itself to the use of the waters of the Chippewa River, for the purpose of water works, there might be a surplus of water power created by the dam. *That surplus*, in case the city became the owner by gift, grant or lease of the bed and banks of the river, would belong absolutely to the city, and, of course, might be leased. No private right, in that case, *could by possibility be violated*. In case the right to erect the dam and take private property for that purpose, was secured by condemnation, then, doubtless, there would also be surplus water, even if no more was condemned and paid for than sufficient to supply the needs of the city for the public use. A portion of the time during every day of the year, especially during the night-time, much less water would ordinarily be necessary for public use than during the hours of the day. That surplus, at least, doubtless, might be leased, and the income thereof turned to account, upon the same principle that the water in the canal in the *Ohio* case, while on its way through the feeder, (no more water being introduced into the feeder than was necessary for navigation,) was held to be properly leased.

These private rights were not mentioned or even referred to in the opinion in the Eau Claire case, except at page 542 where, *seemingly, in order that the opinion should not be misunderstood*, it is stated that the legislature could grant, and the city take power to construct and maintain the dam, not obstructing the navigation of the river, "or violating other right, public or private."

The attention of the Supreme Court of Wisconsin was carefully called to the exact issue presented in the Eau Claire case, in my brief before it for a re-argument, wherein I called attention to the statements contained in the information, and to the fact that there were no parties then before the court between whom, and no issue raised under which the question of private right could *by possibility*, have been properly raised, considered, or decided.

In the case of *Bell vs. the city of Plattville*, 71 Wis. 139 (opinion by Cassoday, J.,) it was decided that the city of Plattville, *owning the lots and the city hall erected thereon*, had by and through its common council power and authority to lease the hall for the purposes of theaters, concerts, shows, dances, and general entertainments, which was the only point decided in the case, except that a citizen or taxpayer, whose private rights were in no way jeopardized, had no standing in court to maintain the action for an injunction to restrain such leasing, even if illegal. In the course of the opinion the Eau Claire cases and *this case* at bar were cited as authorities sustaining the right to lease. Clearly, the *Eau Claire* case last reported was in point, if it is assumed that the city of Eau Claire owned the river bed and banks and dam, and the whole water power created thereby, otherwise not.

The *Eau Claire* case reported in the 37 Wis. had no bearing whatever upon the question at issue in *Plattville* case, because it only decided that the act might be prostituted to serve private purposes alone; nor can I see that the case at bar, as decided by the Supreme Court of Wisconsin had any bearing upon the question at issue in the Plattville case because *there* it was admitted that the city owned the lots and the building, and it conclusively followed *therefrom* that the city authorities were duly authorized to make such use of the building as they pleased, unless the use was prejudicial to the plaintiffs *as individuals*, while the only question at issue in the *Green Bay and Mississippi Canal Co.* against the *Kaukauna Water Power Co.* was as to who owned the surplus water, not as to what purposes it might be lawfully applied after the ownership was determined.

Spaulding vs. city of Lowell, was an action of assumpsit for money had and received, to recover back the amount assessed by the defend-

ant city, upon the plaintiff, and paid by him; *two questions only* were involved. *First*, whether the building of a market house was a public purpose, for the erection of which taxes might be levied upon the inhabitants. *Second*, even if the town had authority to assess money for building the market house, yet whether that would justify the tax, a part of the building being appropriated to their objects. (Page 80.) The court held, after a careful review of the law, that the purpose was public, *and second*, that it was not competent *in that suit* to enquire whether the building was larger and more expensive than the exigencies of the city required. Shaw, Chief Justice, stated the case (page 74), in these words:

"The question, therefore, resolves itself into the general one whether cities and towns in this commonwealth, by virtue of their general powers, and without any special authority conferred on them respectively for that purpose, have authority, in their corporate capacity, to build a market house, to appropriate money therefor, and assess the same in common with other town charges upon the inhabitants."

The case shows that there was a specific taking of a certain amount of private property of each taxpayer for the purchase of a lot and completion of the market house; the cost of the lot was to be $14,055.00, the market house was not to exceed certain dimensions mentioned in the resolution of the town meeting, and the committee was authorized to pledge the credit of the town for such an amount of money as should be necessary, *not exceeding* $30,000.00.

By these votes and proceedings the town decided that a certain amount of private property was necessary and might be taken for a public use, the limit was placed at $30,000.00, *within that limit* the town authorities, in the absence of fraud and abuse of power, were the exclusive and ultimate judges of the size of the building, its construction, and finish; the number and size of the rooms, and the uses to which the same might be appropriated. In this, the case was exactly the reverse of the one at bar, where the power given is in general terms only, the limit being *to that which might be necessary*, leaving the question of *amount* to be decided when it should arise. Because the town authorities in the Lowell case, might take, under the resolutions of the town, by taxation, a small

and insignificant portion of the private property of each taxpayer, it would not, by any means, follow that, under the general provisions of the Wisconsin act of 1848, where the limit was only to *what was necessary*, the public authorities could take the whole of an individuals private property whether necessary or not. In the Lowell case, the amount was limited by the preliminary proceedings and votes of the town, the taking was strictly within the limits prescribed by the votes. The necessities of the town as to use of space would necessarily vary from time to time, and if surplus space should exist, *that* was the *accidental excess* which might be leased, to which reference was made in the decision of the court.

Thus construed, the case is exactly like *Cooper* against *Williams*, *supra*, where it was held that the water necessary for the purposes of navigation, while passing down the feeder, might be leased for hydraulic purposes, *and wholly unlike* the case at bar, where the amount necessary for the purposes of navigation was not determined by the act of 1848, and has never been determined, *in fact*, by any proceeding lawfully provided for such purpose, or *by any act* of the state or its agencies, until, by the determination of the court below, it was decided that, *because of the supposed inconvenience* which would result from a contrary holding, the state did take, under the act of August 8, 1848, prior to the date of the deed to the United States, (September 18, 1872), by the construction of its dam and canal, all of the water of the river, including the immense surplus owned by the Water Power Company.

Spaulding against the *City of Lowell* has been followed in many cases, among others, the following: *George vs. School District*, 6 Met. 497, 500, where the limit was fixed at $1,700.00, for the site of a school house; the district also, by vote, allowing the contractor to build, *at his own expense*, a hall over the school house, the use of which hall the district was to have *free of charge*, for certain purposes, the contractor having also certain rights in its occupancy. *Held*, that the use of the hall was merely incidental to the general power to provide a school house, and that the tax levied was valid. See also:

Hood et. al. vs Mayor etc., of Lynn, 1 Allen, 105.
French vs. Inhabitants of Quincy, 3 Allen, 9.
Minot vs. West Roxbury, 112 Mass. 1--4.

In none of the above cited cases, and in no other case which we have been able to find, has the *accidental surplus or excess* consisted of anything except a portion of that which had necessarily been taken for a public purpose. I therefore submit to your Honors, that, upon all the facts in the record, and all the authorities which have thus far been referred to *by either of the parties* to this case, the taking of the surplus water power, by the judgment of the court below, was for a *private purpose* and that *therefore* the judgment should be reversed.

VI.

ACT OF CONGRESS OF 1875 FAILED TO SUPPLY JUST COMPENSATION.

If it be admitted that the taking of the surplus water, over and above what was necessary for navigation, by the state, *was for a public purpose*, then the judgment of the court below is erroneous, and should be reversed, because thereby the State of Wisconsin enforced the said act of August 8, 1848, so as to deprive the Kaukauna Water Power Company of its property, to-wit: of its said water power, or the use of its said water over and above that which was necessary for the purposes of navigation, without due process of law.

(*a.*) The act of August 8, 1848, was void, for the reason, *in addition to those mentioned in the brief of my associate*, that it allowed (Sec. 17) the "appraisers to assess the benefits or damages, as the case might be, to the owner from the appropriation of such land, water or materials," and *only provided* for the *payment of damages* to the owner *if they exceeded* the benefits as provided in Sec. 21, viz: "If the damages *exceed the benefits*, it shall be the duty of the Board to direct the same to be paid out of the fund appropriated to said improvements, proof of such payment, or the offer thereof, in case the party entitled shall decline to receive the same, shall discharge the state, and every person under its employ, from any claim for such lands, waters and materials, appropriated as aforesaid."

It is the settled law of Wisconsin that the value of property taken

must be paid, and that it cannot be reduced by offsetting against it benefits which may be assessed.

In *Robbins vs. Milwaukee & Horicon R. R. Co.*, 6 Wis. 636, this question is disposed of in the following language: (page 641.)

"We have no doubt that the owner of land taken by a railroad company for its use, under a charter like those usually granted in this state, (and especially the charter of this company) is entitled to recover of the company the value of the land at the time of the taking, without any diminution for benefits, advantage or offset whatsoever. It is too late now to discuss any question adverse to this position. The government can take my land for public use, when necessary, on paying me its value. But it cannot compulsorily make me a party to a forced sale thereof, and compel me to accept certain supposed advantages to my other lands not taken, in lieu of the value of my land taken.

When the government needs my land it has the sovereign right to take it, and when it takes it, by virtue of such sovereign right and power, it is bound by the constitution to pay me the value thereof at the time it is taken. The government cannot speculate upon contingent or conjectural benefits in lieu of the value of the land actually taken, nor can the owner speculate upon what would be thereafter the enhanced value of the land after the purpose for which it was taken should be completed. * * * (p. 643.) If the state takes it, it must be paid for, not by barter of benefits, but in money. It may be reasonable and proper that peculiar damages, outside of the value of the land taken, may be compensated by peculiar benefits, * * * 4 Cush, 291, 10 id. 385."

This decision has never been reversed, but has been followed in later cases, among others, *Blesch vs. Chicago & N. W. R. R. Co.*, 48 Wis. 168-190; *Holman vs. Green Bay & M. R. R. Co.*, 40. Wis. 167; *Powers against Bears*, 12 Wis. 214.

(*b.*) The defects in the act of the State of August 8th, 1848, were not remedied, nor was just compensation for the property of the Water Power Company so taken supplied by the Act of Congress of 1875.

Perhaps no state in the Union has gone further in holding that private property taken for public use must be paid for, than the State of Wisconsin, as to which proposition I am fully sustained by all the cases cited on that subject by my associate in his brief submitted in this case; no exception, that I am aware of, having been engrafted upon the general doctrine excepting in cases of municipal corporations, where it is held that statutes authorizing such corporations to take private property for public use are valid, if they provide an *adequate process* for ascertaining the value of such property, and an adequate and safe fund from which payment is to be made, though they do not require actual payment before the taking. *Brock vs. Hishen et al.*, 40 Wis. 674, 680, 681, where it was held, in a highway case, that when such damages were ascertained in the mode pointed out by the statute, and it was provided that the Town Board should audit the amount of damages so assessed, and *that a tax should be levied on* all taxable property of the town to pay the same, that the act was valid. The court, (p. 681) said: "Any officer failing in his duty in the premises, would, on proper application, be compelled to it by the courts. There is no possibility for the plaintiffs to lose their damages if they resort to the plain and speedy processes which the law places at their command to compel the town to pay such damages."

The Supreme Court, in its judgment below, held that the Act of Congress of March 3, 1875 (Ch. 166, Second Sess. of 43 Cong.), was equivalent to the provisions of the state statute above quoted with reference to highways, when it only authorized *an action to be brought* against the United States in the courts of the State of Wisconsin *to obtain a judgment* for its damages so claimed. In this it is respectfully submitted that the court below erred, and that the Act of Congress relied upon, even if it was intended to apply to cases of this kind, furnished no adequate mode for obtaining compensation, because, supposing the Water Power Company to be fortunate enough to obtain a judgment for its damages, it was then nearly as far from the possession of compensation as it was before

the commencement of proceedings. Not one dollar could be had until an appropriation could be obtained through some act of Congress. It was left to trust to "the future justice of Congress."

It seems to me that this exact question is decided in the case of *Conn. River R. R. Co. vs. County Commissioners*, 127 Mass. 50; the opinion was by Gray, C. J. The doctrine in that state is no more stringent and exacting as to pre payment, or the provision of a sure and adequate fund than in Wisconsin, but the case goes further and points out what is not such a sure and adequate provision.

At page 53, of opinion, the Chief Justice quotes with approval from Chancellor Walworth, 18 Wend. 17: "But it certainly was not the intention of the framers of the constitution to authorize the property of a citizen to be taken, and actually appropriated to the use of the public, and thus to compel to him to trust to the future justice of the legislature to provide him compensation therefor. * * * The public purse (page 54) or the property of the town or county upon which the assessment is to be made, may justly be considered an adequate fund. He has no such remedy, however, against the legislature to compel the passage of the necessary laws to ascertain the amount of compensation he is to receive, or the fund out of which he is to be paid."

The Chief Justice also quotes from *People vs. Hayden*, 6 Hill 359, 361, and proceeds (page 55) as follows:

"When private property is taken directly by the Commonwealth for the public use, it is not necessary or usual that the Commonwealth should be made subject to compulsory process for the collection of the money to be paid by way of compensation. It is sufficient that the statute which authorizes the taking of the property should provide for the assessment of the damages in the ordinary manner, and direct that the damages so assessed be paid out of the treasury of the Commonwealth, and authorize the governor to draw his warrant therefor; because, as observed by Chief Justice Bigelow, 'this is clearly an appropriation of so much money as may be necessary to pay the damages which may be assessed under the act.' It is a pledge of the faith and credit of the Commonwealth, made in the most solemn and authentic manner, for the payment of the damages as soon as they are ascertained and

liquidated by due process of law." Citing: *Talbot vs. Hudson*, 16 Gray 417-431.

The Chief Justice continues (page 56): "But, in the statute before us there is no pledge of the faith and credit of the Commonwealth, no appropriation of the general funds in its treasury, and no authority to the governor to draw his warrant for the payment of the damages out of such funds."

The Chief Justice continues through page 56, and a portion of page 57, to show why, under the statutes there being considered, there was no adequate provision made for compensation, and closes the opinion upon that subject as follows:

"The statute of 1878, C. 277, therefore, so far as it purported to authorize the taking of land of the Conn. River R. R. Co. for a union railroad station, was unconstitutional, and the taking, under that act, was void for want of any provision for adequate and certain compensation to the owner.

That taking, being unauthorized and void, did not alter the rights of the owner of the land, vested no title in the Commonwealth and could not be the basis of a petition to the County Commissioners for the assessment of damages as for land lawfully appropriated to the public use. The invalidity of the taking, and the consequent want of jurisdiction in the County Commissioners, are not cured by the St. of 1879, C. 290, passed since this case was argued, and providing that the sums of money required under the statute of 1878, C. 277, shall be paid from the treasury of the Commonwealth, instead of from the earnings of the Troy & Greenfield R. R. and Hoosac Tunnel. The statement of Mr. Justice Baldwin, in *Bonaparte vs. Camden & Amboy Railroad*, Bald. 205, 226, that it is not indispensable that a law permanently appropriating private property to the use of the public should contain a provision for compensation, or prescribe the mode of making it, but that such a law would be valid if the Legislature should, by a subsequent law, direct compensation to be made, appears to have been founded on the dictum of Chancellor Kent referred to in the early part of this opinion, and is inconsistent with the settled law of this Commonwealth, and with the weight of authority elsewhere."

The owner of the land thus sought to be taken under that void act was awarded a writ of prohibition to prevent the assessment of

damages and simply because the original act authorizing such taking was void.

In this respect there would seem to be an irreconcilable conflict between the decision of the Supreme Court of Massachusetts and that of the Supreme Court of Wisconsin brought here for review, and I respectfully submit that the Supreme Court of Wisconsin carried the doctrine of substituted payment far beyond any previously adjudged case, and that the doctrine of the Supreme Court of Massachusetts is more nearly in accord with all prior decisions of the Supreme Court of Wisconsin, than is its decision which is now brought here for review.

c. But suppose (for the purpose of this argument only), that the Act of Congress of 1875 did furnish adequate *provision for payment after that date of just compensation* for water power taken, it could not possibly by relation or otherwise render the act of Aug. 8, 1848 valid or effectual for the taking *and passing title* to the water power in question at any time *prior* to the approval of the act, to-wit, March 3, 1875.

The only taking of *water power*, (*if ever taken so as to vest title* in the Canal Co. *must have been prior* to the date of its deed to the U. S. Government, over two years prior to the act of 1875. Any taking of water by the Government after September 18, 1872, the date of its purchase of the water way and improvements, could *only* be for navigation, in which case *no compensation* would be due to any one, and no *water power* could be taken, except such as might be created by *water taken* into the canal for navigation, within the doctrine of the cases cited from New York and Ohio, *supra*.

There has been *no subsequent taking* of *water power* therefore since 1872, and if the Canal Co. has any right or title to the water power in question, it must have it under and by virtue of the provisions of the act of 1848.

That act being void, the Supreme Court of Wisconsin erroneously *held* that it was validated by the subsequent Act of Congress of 1875, and especially for reasons stated in the opinion of Chief Justice Gray in Conn. River R. R. Co., *supra*.

If then the taking of the water power in question was indeed for a public purpose as decided by the court below, it was a taking by

virtue of the *void* act of the State of Aug. 8, 1848, and has resulted in depriving the Water Power Company of its property without due process of law.

The concurring opinion of Mr. Justice Bradley in *Davidson vs. New Orleans*, 96 U. S. 107, states the doctrine for which I here contend with clearness and force; that opinion is concurred in and approved in *Hagar vs. Reclamation District*, 111 U. S., pp. 708, 709, opinion by Mr. Justice Field, and has never, so far as I have been able to learn, been overruled or disapproved.

It is respectfully submitted that in the judgment of the court below there is drawn in question the validity of a statute of the State of Wisconsin on the ground of its being repugnant to the Constitution of the United States and that the decision is in favor of the validity of such statute, and that by said judgment the State of Wisconsin, through the agency of its Supreme Court, has deprived the *Kaukauna Water Power Company* of its property without due process of law, and therefore the judgment should be reversed.

DAVID S. ORDWAY,
One of the Attorneys for Piffs. in Error.

IN SUPREME COURT OF THE UNITED STATES.

October Term, A. D., 1889.

No. 701.

THE KAUKAUNA WATER-POWER COMPANY, ET AL., PLAINTIFFS IN ERROR,

vs.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY, DEFENDANT IN ERROR.

ARGUMENT OF DAVID S. ORDWAY, ON BEHALF OF PLAINTIFFS IN ERROR IN OPPOSITION TO THE MOTION OF DEFENDANT IN ERROR, TO DISMISS FOR WANT OF JURISDICTION.

BURDICK, ARMITAGE & ALLEN, PRINTERS, MILWAUKEE.

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May it Please Your Honors—

The attorneys for the plaintiffs in error suppose, and will undertake to maintain, that this Court has jurisdiction of this cause, under and by virtue of the *second* clause of the 25th section of the Judiciary Act of 1789, as now amended by section 2 of chapter 28, of the act of Congress of 1867, and by paragrah 17 of section one (1) of chapter 80 of the act of Congress of 1875, which three acts are now found in section 709 of the Revised Statutes of 1878. The language of that clause of the act is as follows; "A final judgment or decree in any suit in the highest "court of a state in which a decision in the suit could be had, "* * * * * where is drawn in question the validity of a "statute of, or an authority exercised under any state on the "ground of their being repugnant to the constitution, treaties "or laws of the United States, and the decision is in favor of "their validity, * * * * may be re-examined and reversed or affirmed." etc.

This act, as it stood in 1874, prior to the amendment of the 18th of February, 1875, is interpreted and construed by this Court, after full argument, in the case of *Murdock* vs. *Mem-*

phis, 20 Wall. 590, the decision wherein was rendered January 11, 1875.

2d. The attorneys for the plaintiff in error will also undertake to maintain that the federal questions upon which they rely (and which are, as they suppose, indicated by their assignments of error), sufficiently appear *in the record* as here returned in response to the command of the writ, and that such questions were actually presented to and necessarily decided by the Supreme Court of the State of Wisconsin.

I.

We maintain that in and by the final decree in this cause, as rendered by the Supreme Court of the state (and afterwards entered in the Circuit Court, *pursuant to the mandate and opinion* of the Supreme Court), *is drawn in* question the validity of a statute of the State of Wisconsin, as well as an authority exercised under the State of Wisconsin, on the ground of their being repugnant to the fourteenth amendment of the constitution of the United States, and that the decision is in favor of the validity of such state statute and of the authority exercised under the State of Wisconsin, pursuant to the provisions of the same act, as construed and interpreted by the decree in this cause in the court below.

In the case of the *Baltimore & Potomac R. R. Co.*, 130 U. S. 210, your Honors construed similar language contained in the act of Congress of March 3, 1885, regulating appeals from the Supreme Court of the District of Columbia and the Supreme Courts of the Territories. It is there said, (P. 224): "Whenever the power to enact a statute, as it is by its terms, or is "made to read by construction, is fairly open to denial, and denied, the validity of such statute is drawn in question, but "not otherwise."

This being a controling definition, it seems to us very plain that this court has jurisdiction and that the same will readily appear from a careful reading of the complaint, answer and opinion of the court below.

The complaint, under a very liberal construction, although we saved the point by demurrer *ore tenus* (fol. 71 record), may be said to contain three grounds of action; *first*, based upon the Act of the state of 1848, and which extends through the whole complaint; *second*, based upon claimed or alleged grants from Beardsley as to lot 5, and from Hunt as to lots 6 and 7 (page 10 of printed record); *third*, claimed under the statute of limitations.

As the court below placed its decision wholly upon the first ground, above stated, it will be unnecessary, upon this motion,

to spend much time upon the others, not more, certainly, than sufficient to show that none of them constituted the ground of decision.

SUBSTANCE OF COMPLAINT

As to the *first*, the complaint (pages 1 to 3 of printed record) states that the Fox was and is one of the navigable rivers of the state, has an average flow of over 150,000 cubic feet per minute, and affords a water power of over 300 horse power per foot fall, was a meandered stream, that there existed therein at the place in question, rapids and falls, that dams and canals were requisite in order to secure slack water navigation thereof. That Congress, in 1846, granted lands in aid thereof, that in 1848, Wisconsin, upon its admission to the Union, accepted the grant, and on the 8th of August, 1848, passed the Act in question, and in said Act provided for a board of public works to superintend the completion of such improvement. That in and by said act, the state provided that "whenever a *water-power* shall be created, by reason of any dam or other improvement made on any of said rivers, such water-power shall belong to the state, subject to the future action of the legislature."

The complaint then continues (page 2) "*By this act, the state of Wisconsin appropriated to its own use and to the use of its assigns and successors*, the water-power of the said Fox river, which should thereafter be made available by dams erected in the business of improving said Fox river" that such water-powers were and are of great value, and *that the value thereof has been expended* in improving the navigation of said rivers within the intention of said Act of Congress. That one of such rapids was located at the premises in question. That in the prosecution of the work, the State of Wisconsin, between the 8th of August, 1848, and the 6th of July, 1853, constructed a dam at the head of said rapids, so as to raise the water upwards of eight (8) feet (on the land of this plaintiff in error) above the natural level. . . . and did build a canal and locks on the north side of the river, opposite the lands of plaintiff in error, extending from the pond created by said dam to the slack water below said dam and rapids. "*That said dam was built and maintained under the authority of the said act of the state of Wisconsin, approved August 8th, 1848*, and amendatory acts, providing for the completion of such improvement, *and that there is no other authority for building or maintaining of the same*" (page 3 of record).

The complaint then proceeds (from middle of page 3 of record, on to about the middle of page 4) to show the insuffici-

ciency of the fund provided, the embarrassment of the trustee, to wit: The State, its creation in the year 1853, of a private corporation, to wit: "The Fox and Wisconsin Improvement Company," through or by which the undertaking should be completed, and a transfer by the trustee, to such corporation of all of the works and property of the said improvement, *among which* was the dam, canal and works at the point in question. The complaint here alleges *as a fact*, that "all of said dams, locks, canals, *water-powers* and other appurtenances of said works, and all of said rights, powers and franchises passed to and vested in the said Fox and Wisconsin Improvement Company."

We remark in passing, however, that the Act of 1853 pleaded (middle of page 3 of record), only purports to grant or transfer the same so far as it, the trustee, had power so to do.

The complaint then states (page 4): "That said dam furnished * * * a large and valuable hydraulic power, which is one of the powers mentioned in the act of * * * 1848 * * * and was part of the consideration of the transfer. That in the belief that they owned such hydraulic power, the Fox and Wisconsin Improvement Co. bought lands adjacent to said canal for the purpose of rendering said hydraulic power available. That *the state, as trustee*, had no power to make any such purchase, and would not have taken such transfer and undertaken to complete such improvement, had it not believed that it thereby became the owner of the hydraulic power. That this was long before any statute of limitations could have run, or laches have been imputed and long before any release or grant to it by them."

The complaint then proceeds (page 5) to state every material fact, showing an utter absence of any sufficient fund, from which the plaintiff in error could be paid just compensation, even if the taking was for a public purpose, to-wit: That without the ownership of such *hydraulic powers* so reserved to and appropriated by the state * * * by the act of August, 8th, 1848, neither the state, nor the Fox and Wis. Imp. Co. would have been able to secure the completion of said improvement. That the ownership of such hydraulic powers was an essential and necessary part of property to enable the state and said Fox and Wis. Imp. Co. and its grantee, this plaintiff, to complete and maintain said improvement.

This is the greatest certainty disclosed to thought or fact of obtaining our water, except under and pursuant to the provisions of this act of 1848.

Thence on, from about the middle of page five of the record,

to the foot of page seven, the complaint states as a link in its chain of title, a mortgage of the "Improvement" (so here called in order to abreviate) by the Fox and Wis. River Imp. Co. to trustees, the default of the company, foreclosure of the mortgage, sale thereunder and conveyance to the plaintiff below, the G. B. & Miss. Canal Co.

It will be observed that this mortgage was in general terms only (page 5 record) of all of the unsold lands granted by Congress, all works of improvement, all rights of way, dams, locks, canals, water-powers and other appurtenances, without specifying any one in particular, and while we in no way contest the the validity of the title to the Improvement, the granted lands and franchises, we simply here, and in our answer as pleaded, deny that it carried our *client's property*.

The complaint proceeds (pp. 8 and 9 of record) to state the legislation of this State and of Congress, whereby the plaintiff below was enabled to and did sell and transfer to the United States this water-way, plaintiff below excepting therefrom and retaining its personal property, its water-power lots and such water-powers as it owned, claiming *this* water-power as one of them, and at the middle of page 9 of the record summing up as follows:

"That the United States has the use and control of said canal, dam and embankment appurtenant and of the water furnished thereby, for the purposes of navigation only, and that this plaintiff has the right to the exclusive use of same and has title to and possession of same for purpose of using all surplus water drawn and to be drawn from said mill pond *over and above the amount* necessary for use in navigation."

That the use of said surplus water drawn and to be drawn from said mill pond is of great value to this plaintiff, to-wit: Of the value of $100,000 to be used on plaintiff's lots aforesaid, and on such other lands and lots as plaintiff may purchase or as plaintiff may lease water to be used upon."

The complaint then, at page 10 of record, sets out the original ownership of our lot 3 to have been in Beardsley, our predecessor in title, and that he, at the time of building of said dam, granted to the State of Wisconsin "*the right to build and forever maintain said dam and all necessary embankments to make same useful and available on lot 3*," and that he, Beardsley, waived condemnation and appraisal of damages of his lands and riparian rights parcel thereof and appurtenant thereto.

As to this, we argued below, that it was, upon the words of the complaint, the conveyance of an easement for the purpose of navigation only, but our claim proved to be immaterial, because there was no evidence of any such grant, or of any such

waiver, and both courts below held that none such were proved; the Circuit Court, by dismissing the complaint, and the Supreme Court (page 90 of record) in these words: "That the construction of the Kaukauna dam and improvements *by the state and its appropriation of water-power thereby created*, take the property of the owner of lot 5, and deprive him of his riparian rights just mentioned, which are also property, does not seem to admit of doubt or controversy. *Such owner has never been compensated* for his property so taken, neither has he released his right thereto."

The complaint then, near the foot of page 10 of the record, states: "That one John Hunt, through whom defendant claims, in 1854, was owner in fee of said lots 6 and 7 (which, we add, lie up stream from lot 5), and then granted to the Fox and Wisconsin Imp. Co., its successors and assigns, the right to erect and forever maintain along, over and on said lots 6 and 7, where they abut on the south side of said Fox river, an embankment of sufficient height and width and strength to hold the water in said mill pond, and also to excavate a ditch or drain on the land side of such embankment, three feet in width," * * * "and that under and by virtue of such grant, said Fox and Wis. Imp. Co. did build such embankment and dig such ditch in the year 1854," and that under and by virtue of such grant *and the said act of Wisconsin of 1848*, such embankment and ditch have been hitherto maintained. This, we also claimed, was the conveyance of and easement only for navigation.

The complaint then (page 11, record) sums up in these words, viz:

"That during all the time since the building of said dam in 1851, the State of Wisconsin, the Fox and Wisconsin Improvement Company, its trustees under said trust deed, and this plaintiff, have notoriously, openly and in the most public manner, and to the knowledge of all riparian owners on said river, claimed, exercised and proclaimed dominion and control over, and title to, and ownership of, all the hydraulic power or water-power furnished by said dam, and by all other dams of said river, built and maintained by them from time to time, and all the time as each has been successively the owner and holder of the franchises granted to improve the said Fox and Wisconsin rivers; and which dominion, control and claim of title and ownership have heretofore been acquiesced in, and not questioned nor interfered with by the defendants or any of the persons through whom they or either of them claim title to the lands bordering on said river, until the commencement of their canal, hereinafter described, about five years ago."

The complaint then, at pages 12 and 13 of the record, states the origin of the title of the plaintiff in error, the location of

its property skirting the river on the south, that it claims through Beardsley and Hunt, as above set out, that it has constructed its canal upon its own land in order to draw and that it is drawing water through the same for hydraulic purposes, ending with prayer, *inter alia*, for a perpetual injunction restraining defendants from drawing water from said pond for any purpose, except for ordinary use for agriculture.

Thus, it will be seen that the complaint, from beginning to end, counts upon the act of 1848, and the rights, title, powers and privileges by it granted and conferred. Although it is probable that the complaint is demurrable for the want of sufficient statement of *facts* to sustain any claim of right in the plaintiff (below), the defendant passing by technical defects, for the purpose of speeding the cause, answered the same at length, denying not only some of the allegations of fact alleged, but the whole of the objectionable conclusions of law *seriatim*.

DENIALS IN ANSWER.

Thus, at page 16 of the record, its denial is of the allegations contained in folios 6 and 7 of the complaint. The allegations there denied are as follows:

"*By this act*, the State of Wisconsin appropriated to its own use and the use of its assigns and successors, the water-power of said Fox river, which should thereafter be made available by dams erected in the business of improving said Fox river, etc."

This denial is certainly as lawer-like as the allegation denied, and as broad. It does not deny the existance of the Act of 1848, but denies its effect, denies that either for a public or private purpose, or for any reason whatever, the act was effectual to transfer the private property of the defendant below to the state. It denies the power of the state by such an act, to transfer the property of one party to another, and thus virtually says, that the state has no power to confiscate the property of individuals.

At page 17 of the record, the denial is in these words, viz: "And these defendants deny that all the hydraulic power furnished by the said dam * * * passed to said Fox and Wisconsin Improvement Company, by said transfer of 1853, or in any other way and on the contrary thereof, state upon information and belief that none of the hydraulic or water powers, upon or appurtenant to the south or southerly bank of said river and furnished by said dam, ever passed to or were owned by said Fox and Wisconsin Imp. Co."

These transfers are in the complaint alleged to have been perfect, valid, effectual, and authorized and so made valid by the Act of 1848. The right so claimed is from first to last, by and through this statute, alleging and assuming its validity.

The answer draws in question the validity of the statute, as well as the power of the legislature to enact it; it denies that. "*By this act* the State of Wisconsin appropriated to its own use * * the water power of the Fox river. The act, as construed by the court below, says in plain positive terms, that all such water powers are so appropriated to itself. Of course that is true if the state owned the water or its use, or if it had the power to so transfer the property of individuals.

At page 18 of the record, the defendant denies that the plaintiff, under the foreclosure, or in any other way or manner, took or obtained title to any strips or parcels of land adjacent to said improvement on the *south* side of Fox river, in lots 5, 6 or 7, mentioned in said complaint, other than or aside from the easement released by the said John Hunt * * also denies that through such foreclosure sale, or otherwise, the said committee, or said plaintiff, * * ever took or obtained title to all of the water powers created by or upon the line of, or connected with the work of said improvement company.

The answer then and finally, at page 22 of record, put its denial in these words, viz: "And these defendants deny that either the plaintiff, the Fox and Wisconsin Imp. Co., or the State of Wisconsin ever had or owned any water, right to water, or water power (except for the purpose of navigation), upon or along said Fox river, except as riparian owners; and these defendants, *upon information and belief, state that the State of Wisconsin never had authority under* its constitution to acquire by purchase, condemnation, or otherwise, or to accept or receive title to any land or water, or water power along or upon said Fox river, except for the purpose of navigation, and that it never had any right, power or authority to take or condemn private property for the purpose of milling or manufacturing of any kind, or for the purpose of transfer or sale, or lease thereof to others for any purpose other than navigation."

Counsel for defendant in error (page 13 of brief) criticises this denial of power so put in affirmative form, by stating that "No advantage can be taken of any expressions in any of the proceedings of plaintiffs in error, if any such are to be found, as speak generally of constitutionality. In such cases, if any there are, reference is made to the state constitution. That was brought in question on the oral argument as well as invoked by the answer."

Counsel does not interpret the answer in this respect as we

do and as we think it should be interpreted. It is as follows. (Page 22, record): "And these defendants, upon information and belief, state that the State of Wisconsin never had authority under its constitution to acquire by purchase, condemnation or otherwise, or to accept or receive title to any land or water, or water power along or upon said Fox river, except for the purpose, of navigation." Thus far, the want of power is alleged to be, under its constitution, such was doubtless the thought of the pleader, because of the prohibitions contained in article 8 of that instrument.

"SEC. 3. The credit of the state shall never be given or loaned in aid of any individual, association or corporation.

SEC. 10. The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works, but whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of improvement, the state may carry on such particular works, and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion."

Under these provisions the first part of the above quoted paragraph of the answer was framed: Then follows the next and an independent clause or denial, which as we understand it, reads in connection properly, thus: "And these defendants, upon information and belief, state that the State of Wisconsin * * never had any right, power or authority to take or condemn private property for the purpose of milling or manufacturing of any kind, or for the purpose of transfer or sale or lease thereof to others for any purpose other than navigation.

Thus read, and construed the power of the State to take or condemn for private use is denied generally, without reference in words to any constitution, and the power to enact section 16, of the Act of 1848, is denied.

But as we understand the decision of this court in *Spencer vs. Merchant*, 125 U. S. 345, it makes no difference whether the claim in the answer of want of power, was specifically placed upon the inhibition of the one constitution or the other, if both are, in this respect, alike. We submitted to our Supreme Court the question whether the attempted appropriation of our property by the state was valid, and we there, in our pleading, and upon the trial, contended that the statute of 1848 was unconstitutional and void, because it was an attempt by the legislature to appropriate our property; first, to private use, if not so; second, to public use, without providing in the same act, or in any other law or statute then in force, any mode or proceeding for obtaining compensation therefor.

Your Honors, in *Spencer* vs. *Merchant*, state the proposition in these words (page 352.)

"He thus directly and in apt words, presented the question whether he had been unconstitutionally deprived of his property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, as well as of * * the Constitution of New York, and no specific mention of either constitutional provision was necessary in order to entitle him to a decision of the question by any court having jurisdiction to determine it."

Here, as there, the adverse judgment of the court of last resort below (after the court declined to decide the case upon any other of the grounds contained in the pleadings or claimed upon the trial), necessarily involved a decision against a right claimed under the Fourteenth Amendment, * * which this court has (we submit) jurisdiction to review.

The argument of Mr. Cary will show the identity of the two constitutions upon this subject.

Counsel for defendant in error having admitted that the protection of our State Constitution was invoked in our answer, and was insisted upon in argument below, under the above decision, there can be, it would seem, no doubt but that the federal question is in the case, was presented to the court for decision, and actually and necessarily decided.

It seems to us from this examination of the pleadings that the power to enact this statute of 1848 is alleged in the complaint and denied in the answer always and everywhere. The act itself, upon which plaintiff bases the right, designates the property to be taken as a water power, and it is to belong to the state, subject to future legislation. The complaint alleges its need thereof *for sale* in order to pay for making the improvement, showing plainly and beyond question the use to be private. The answer denies the power of the state to take property for any such purpose.

It is true that the answer does not in so many words say that the power is lacking and act void, because contrary to the provisions of the fourteenth amendment of the constitution, nor is it necessary that it should, *provided* the question of power was in the case, was material to the decision and was actually decided by the court, sustaining the validity of the act and of the power exercised under it, and that no other question was decided upon which the judgment could rest.

This court has already decided this question in several cases; one of the earlier is *Wilson et al. vs. The Black Bird Creek Marsh Co.*, 2 Peters 245. The language of the opinion upon this question is (page 250) *inter alia*, as follows:

"The defendants in error deny the jurisdiction of this court, because, they say, the record does not show that the constitutionality of the act of the legislature under which the plaintiff claimed to support his action, was drawn in question. Undoubtedly the plea might have stated in terms that the act, so far as it authorized a dam across the creek, was repugnant to the Constitution of the United States; and it might have been safer, it might have avoided any question respecting jurisdiction so to frame it. But we think it impossible to doubt that the constitutionality of the act was the question, and the only question which could have been discussed by the court. The plaintiffs sustain their right to build a dam across the creek by the act of the assembly. Their declaration is founded upon the act. The injury of which they complain is to a right given by it. They do not claim for themselves any right independent of it. They rely entirely upon the act of assembly. The plea does not controvert the existence of the act, but denies *its capacity* to authorize the construction of a dam across a navigable stream. The plea draws nothing in question but the validity of the act; and the judgment of the court must have been in favor of its validity. Its consistency with, or repugnancy to the Constitution of the United States, necessarily arises upon these pleadings and must have been determined. Two prior cases are then cited, of which the 'opinion' says: "They establish, so far as precedents can establish anything, that it is not necessary to state in terms on the record, that the constitution, or a law of the United States was drawn in question. It is sufficient * * * if the record shows that the constitution or a law * * * of the United States must have been *misconstrued* or the decision could not have been made. Or, *as in this* case, that the constitutionality of a state law was questioned and the decision has been in favor of the party claiming under such law."

This court will, we trust, pardon this full quotation, because if in point, we think it decisive of this motion.

The case is, as we understand it, exactly like the one at bar, with but *one* exception; there the *only* right claimed by the plaintiff was under the statute of the state, which was held valid. Here there were other rights claimed by the plaintiff in its complaint, which, if they had been passed upon and decided in favor of the plaintiff, would, probably, have sustained the decree, and thus no federal question would have been decided or shown by the record. But when it affirmatively appears *from the record*, as is the fact here, that such other questions were *not* decided in favor of the plaintiff, but so far as any mention was made of them by the court, while declining to decide the case upon them, were held insufficient to sustain any

claim made upon them, then we think and insist that the difference between the cases is entirely immaterial, and that we are strictly within the last clause of the opinion above quoted, *i. e.:* "Or, as in this case, that the constitutionality of a state law *was questioned* and the decision has been in favor of the party claiming under such law."

Crowel vs. Randall, 10 Peters 368, while it held that no jurisdictional question existed therein, at page 392, reiterates the doctrine above established.

Bridge Proprietors vs. Hoboken Co., 1 Wall. 116, is another case of the same character, and in which it was held that jurisdiction existed. The court, at page 142 (opinion by Miller J.), states the doctrine in these words:

"It would be a new rule of pleading, and one altogether superfluous, to require a party to set out especially the provisions of the Constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, *and especially this court* (italics mine), can be supposed to take judicial knowledge of anything, without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant, in their pleadings make a case, which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact, without requiring the pleader to say, in words: "This paragraph of the constitution is the one involved in this case."

The above cases were decided prior to the amendment of the judiciary act, of 1867, and while the opinions of the lower courts (except, perhaps, Louisiana), were not part of the record, and while it may be true, that without being permitted to go to the opinion in this case, but deciding alone upon the complaint, answer and final *judgment*, it cannot be determined upon which claim of the complaint judgment finally went; yet, *as a matter of pleading*, the complaint and answer show a federal question and that is sufficient to protect the plaintiff in error against the claim made, in argument of counsel in support of this motion, that no federal question appears in this record, aside from the opinion of the court below.

See also Furman vs. Nichol, 8 Wall. 56.

The proposition of defendant in error (page 10, brief), is: "It could not, by its opinion, give the court jurisdiction. This court will not look into the opinion to find support for its jurisdiction."

Literally, now, that proposition is inaccurate and only correct when and where there is no federal question to be found in the pleadings and record. In other words, the federal questions cannot be *originated* by or in the opinion. The case of *Moore vs. Miss.*, 21 Wall. 636, cited by counsel in support of this motion in Note 6, page 11 of the brief, states the law and the present practice correctly.

Right here, we will call attention to the power of the Supreme Court of Wisconsin, to re-try equity causes and even to render *final decrees* therein *in the* Supreme Court, and never return the record back to the court below. Such is the power and jurisdiction of that court. Persons vs. Merrick, 5 Wis. 231; Geisse vs. Beall, *et al.*, 5 Wis. 224; Reed vs. Jones, 8 Wis. 421; Boyd vs. Sumner, 10 Wis. 48; Miner vs. Medbury, 7 Wis. p. 101, where it is said, "the opinion is *really the mandate of this court.*"

Therefore, the whole proposition of counsel, at folio 28, page 10 of brief, supported by cases cited in Note 5, is without force and the decisions of this Court in *Susquehanna Boom Co. vs. West Branch Boom Co.*, 110 U. S. 57; *Simmerman vs. Nebraska*, 116 U. S. 54, holding that the federal question must appear from the record as it stood *when the judgment was rendered*, must in an equity case from the State Court of Wisconsin be held to refer to the Supreme Court, because a motion for a re-hearing is part of the regular proceedings of that court, and no *final* judgment is rendered in that court, or below, pursuant to its opinion, until all motions and petitions for re-hearing are disposed of. The remittitur and copies of opinions did not go down in this case, until after all the questions and motions had been disposed of by and in the Supreme Court; there its opinion, which was its mandate, went down commanding the entry of *final judgment*. See *Miner vs. Medbury, Supra.*

Counsel pays but a poor compliment to the discernment of defendant's attorneys, as to the location of the federal question herein, and entirely mistakes the functions of a judge of a court of last resort by the suggestion (p. 12 brief), that if any such federal questions had been drawn in question, "Judge Lyon would, no doubt, have recited them."

II.

OPINIONS PART OF RECORD.

It being thus, as we suppose, established that a federal question is involved in and shown by the pleadings, the next ques-

tion is, was the decision of it, against the plaintiff in error, and was the question necessarily passed upon by the court below and decided by its judgment?

The judgment being in favor of the defendant in error, *may have been placed wholly* upon the validity of the Act of 1848, but from the judgment alone, without going to the opinion, it might be impossible to say which of the grounds stated in the complaint, it did in fact go upon. But now and ever since the time of the decision in *Murdock vs. Memphis*, 20 Wall. 590, this court looks into those opinions (especially when and where by state law, as is the case in Wisconsin, they are made part of the record), "*as far as may* be useful in determining that question," (p. 633 *id.*) and more especially so now, since the adoption of Rule 8, of the rules of this court, announced Jan. 7, 1884.

To the same effect is *Gross vs. U. S. Mortgage Co.*, 108 U. S. 477, decided in 1883, before the adoption of rule 8, jurisdiction was also there questioned, but retained by this court.

In *Adams County vs. Burlington & Mo. R. R. Co.*, 112 U. S. 129, the court says: "But if we look to the opinions, which, under the laws of Iowa must be filed before a judgment is rendered, and which, when such is the law, may certainly be looked at to aid in construing doubtful expressions in a decree; it is shown unmistakably that the decision was put on that (*non*-federal) ground alone."

We quote the above language for a double purpose; *first*, as showing the right and duty to look into the opinion; and *second*, to base this proposition upon, to-wit: That if you may so examine the opinion in order to learn that the decision was in fact placed upon a ground *not* federal, you may also in a like case examine it in order to determine that the decision was placed wholly *upon* federal ground, because it is a rule which should work both ways.

In the case of the *Phila. Fire Association vs. New York*, 119 U. S., this court (p. 115-116) says: "The defendant claims here the benefit of the Fourteenth Amendment, and a question has occurred as to whether the record presents that point for our review. There being no pleadings, the obvious place to look for the claim, would be the agreed statement of facts. But all that is there said is, *that the defendant insists* that the statute is "unconstitutional and void and not a legitimate exercise of legislative power." The question was considered in both the Supreme Court and the Court of Appeals, as to the validity of the statute, under the constitution of New York, as being a law made to depend for its operation on the legislation of a foreign state, and thus an illegitimate exercise of legislative power.

This contention is fairly within the words of the agreed statement, and if it depended wholly on that statement to determine whether the record raises a federal question, some doubt might exist. But * * * * we think we are at liberty to look into the opinion of the Court of Appeals, a copy of which, duly authenticated by the proper officer, is transmitted to us with the record, in compliance with our 8th Rule, for the purpose of aiding in determining what was decided by that court. From that opinion it appears that the court not only decided against the defendant all the questions other than federal which were raised, including two under the constitution of New York, but also decided against it the federal questions referred to. If the court had decided in its favor any one of the other questions which went to the whole cause of action, there would have been no necessity for considering the federal question. But as it was, the decision of that question became necessary to the disposition of the case, and was fully considered, not *sua sponte*, but as a point presented by the defendant."

III.

SUBSTANCE OF OPINION.

The opinion returned as part of this record (p. 83 to 93), at page 88, states that "the claim of the plaintiff (defendant in error), to all of the surplus water power, created by the dam, is based upon the proposition that section 16 of the act * * of August 8, 1848, appropriates all such water power to the State. This proposition is disputed on behalf of the defendants." Our first position, as understood by the court, is then set forth, and rejected. On page 89, folio 152, the court says: "We conclude, therefore, that whatever rights the *state took* to the Kaukauna water power, by the act of 1848 (*which is the absolute ownership of the whole thereof, if that is a valid act*), is vested in the plaintiff.

"2. It is further maintained, on behalf of the defendants, that conceding the Kaukauna water power is within the provisions of Section 16, of the Act of 1848, such act is invalid as to the surplus of the water power, and above that required for navigation of the river, for the reason that it is taking private property for *private use*, which is beyond the power of the legislature. Here, also, we are compelled to differ with * * * counsel for defendants."

The opinion thence onward to fol. 154, page 90, gives the reasons of the court for its rejection of our claim, that it was a

taking for a private purpose, which briefly stated, are: That the taking of the whole was *necessary* for the purpose of navigation, as to which more would be out of place here, but it shows that our *first* ground of contention [to-wit: That the act of 1848, construed, as the plaintiff contended that it should be, was unconstitutional and void for want of power in the legislature to enact it], was before the court, understandingly decided against, and the law of 1848, held valid as against the first attack.

We will say briefly here in passing, that the cases cited by the court, pages 89, 90, as sustaining the view adopted, and which are claimed to be controling, were wholly varient as to their facts and as to the parties before the court, and were most essentially different in this; that here the 16th section of the Act of 1848, declares upon its face, under the construction of the Supreme Court, that the taking of this water power was for a private purpose. It is declared on the face of the act, to belong to the state, subject to the future action of the legislature; and the complaint informs us that it was needed and expected and intended to be sold, leased, or otherwise appropriated by the trustee, State, in payment of, or to assist in paying for the construction of the works of improvement. A water power, as contemplated by the act, could only be created by surplus water afforded by the river over and above what was necessary for navigation, therefore the appropriation could only be of a *water power*, and not of something which might be said to be necessary for the purposes of navigation.

In the case in the 23 Pickering cited by the court, page 90 of record, the *accidental surplus*, was taken for the public purpose. The town hall was to be constructed in view of future needs and prospective growth; the taxation, however, was for but the public purpose; for the immediate use of the public, a smaller building would have been sufficient, but in the discretion of the public officers, a larger building was decided upon, some of the rooms in which would not be needed for present use; those might be leased temporarily until needed by the public for its use, and therein lies the vital distinction between the cases. There it was for a declared public use, while here it is exactly the reverse.

Returning from my digression, the opinion, while holding that the taking is for a public purpose, admits substantially (pp. 90, 91 of record, folios 154 to 156), that, so construed, the Act of 1848 was void because of its failure to provide any valid mode of proceedure by which the land owner could obtain just compensation, but it asserts (foot of page 91, record) that "whatever defects inhered in the Act of 1848, they ceased

long since to be of any importance." That act has been fully executed; the improvement which it authorized has been made and ever since maintained, and the title thereto, *except to the incidental surplus water power reserved by the plaintiff*, has passed to the United States. The failure of the State Legislature to provide adequate compensation for private property taken for or injured by the improvement, has been supplied by the act of Congress of 1875."

The Supreme Court of Wisconsin here says that this Act of 1848 was valid to the extent of passing to the plaintiff this surplus water as early as 1872, the time when it sold and transferred the water way to the United States, which was the 18th of September, 1872, because it says, the title, except to the incidental surplus water power *reserved by the plaintiff*, has passed to the United States. It is that incidental surplus water power, and nothing more, which the plaintiff did *not* own in 1872, which it could not and did not attempt to convey to the government, which is given to the defendant in error by the judgment of the court below. The defendant in error claims such water power under the provisions of the law of 1848 and upon the two other grounds, the court refuses specifically to grant its prayer upon either of the other grounds, but does grant it expressly upon the validity of the law of 1848. It says, by its judgment, that plaintiff owns this surplus water and enjoins defendant from using it; says in its opinion, "plaintiff does not hold or own it under its *claimed grants* or under the statute of limitations," consequently there is no other ground left upon which to rest the judgment.

The court very plainly decides (following the *dictum* in Bonaparte vs. R. R. 1 Baldwin 226), that the law was constitutional although it failed to contain a valid provision for obtaining compensation, it having been, as the court holds, before this suit was commenced, supplemented by the act of Congress of 1875 curing such omission. As to the correctness of this conclusion we have nothing now to say, except that His Honor, Mr. Justice Gray, while sitting as Chief Justice, had occasion in writing the opinion of the Supreme Court of Massachusetts, in the case of the *Conn. River R. R. Co. vs. County Commissioners*, 127 Mass. 57, to explain why and wherein it was incorrect, and to show that such invalidity could not be cured, as to any *previous taking* by the passage of a subsequent act. Certainly not so as to vest title.

The defendant in error had title to this water as early as the 18th of September, 1872, the date of its conveyance to the government, or it never had it. If it had it before then, it must have held it under the provisions of the said Act of 1848 *as it stood at that time*. The suplementary act of Congress was

not passed until two years later. The government neither bought of or sold to the Canal Co. any water power; it declined so to do. It said "we have no use for water power, if indeed you have any; whatever you may have, and we know not, nor do we care how much or how little it is; you have retained it so far as we (government) are concerned, we will pay you for your water way and improvements connected therewith. The right to water sufficient for all purposes of such navigation is in the public; we are entitled to that without payment of compensation to any one, what we pay for and take conveyance of, is the improvement; it matters not to us what you except or retain in your conveyance, so long as it does not interefere with navigation."

The government thus came under no obligation, legal, moral or equitable, to pay to private owners for surplus water not needed by it, for the mere purpose of making good, by relation, the *claims* to water power thus sought to be retained by the Canal Company, and in fact it never did so, as by subsequent argument, if jurisdiction is retained here, will be made clearly to appear.

These considerations show that the court below did actually decide that the law of 1848 was constitutional and valid, and that under and by virtue of it the plaintiff below was the owner on September 18th, 1872, of this, our water power, that it excepted it out of the conveyance to the government, retained it, and that the government must pay for it. When we make that claim, doubtless the government will answer: "We have never either purchased or taken your surplus water, we do not need it; we have never directly or indirectly agreed to pay for it, and we see no justice in any such claim."

If this is not the true ground of the judgment, then the court must have decided, that as to lot 5 and our water power upon it (which is entirely sufficient for the purposes of this case, because both the old and the new dam are upon this lot, which has a frontage of over twenty-five rods upon the river, see map), the government in the building of the new dam and embankment thereupon for *navigation* purposes only, and without purchase or condemnation (although the old dam still remains, but overflowed), created a water power upon the land of this plaintiff in error, the title to which, in some way, not explained, either before or after the enactment of the act of Congress of 1875 went to, enured to, or vested in the Canal Co., defendant in error. No one has ever made any such claim, and the pleadings go entirely upon other grounds. But it is apparent, we think, that by a fair construction, this opinion contains no intimation of such a thought. The opinion, page 92, proceeds: "The failure of the State Legislature to provide

adequate compensation for private property taken for or injured by the improvement, has been *supplied* by the act of Congress of 1875, in and by which an easy method is provided to ascertain the compensation to which the owner of such property is entitled, and the United States has assumed the payment thereof." This shows the intention of the court to thus validate the law of 1848, and the original claimed taking of our property under it.

Your Honors will have long since noticed, that no specific water powers are mentioned by the Act of 1848. It is claimed by the defendant in error, in its complaint, that it was by the act of *locating* this dam *by the state*, and building the same between the years 1848 and 1853 that the state appropriated this water power, but that act of location was in and of itself alone, equivocal. The dam was necessary for navigation, and when constructed, did not necessarily amount to an appropriation of water for water power or hydraulic purposes.

The Fox & Wis. Imp. Co., representing the state, had the right to have and keep the dam there, and to draw through the canal so much water of the river as was needed for navigation; in doing all of this, there was not any assertion of right to the water power belonging to the south side of the river. Next, the Fox & Wis. Imp. Co., on the 28th of August, 1855 (page 50, folio 72 of record), purchased and took conveyance in fee of the land on the *north* side of the river (see page 9, fol. 8 of record), from a point several rods above said dam, extending down stream on section 24, in fact about 1,400 feet along the north bank, so that when navigation actually commenced, the plaintiff's predecessors in title, *ie.* Fox and Wis. Imp. Co. was a riparian owner over against upon the other side of the river from the defendant, and *as such* would have, so far as the defendant was concerned, the right to the use of one-half of the water of the river, as long as the state or the public maintained the dam. There is not any allegation in the complaint, as to when, if ever, the Fox & Wis. Imp. Co., or its successor in the title, *i. e.* the plaintiff, first took water through the canal for hydraulic purposes, but it was in fact by the lease to Cord and Gray, mentioned at fol. 83, page 56 of record, and in the year 1861, and then only of a small amount not to exceed 200 horse-power, stipulated at not over 10 per cent. of the whole power up to the time when plaintiff took title, Aug. 16, 1866. Since then more has been used upon plaintiff's side of the river, but never as much as half of the power created by that dam. (See fol. 103, top of page 67 of record). There was therefore *no act* of the state or of the plaintiff, or of its predecessors in title, which was inconsistent with the defendant's claim of title, or which in and of itself amounted to an actual appro-

priation of the water power of the defendant. When this suit was commenced, and perhaps when the plaintiff served its notice (set out in complaint, fol. 9, pages 11 and 12 of record), about Dec., 1880, there was an assertion of right on the part of the plaintiff to this, our water power, never before then.

It may therefore be an open question, how, exactly, our water has been taken, whether by and under the law of 1848 and the act of its agents in locating and building of the dam, or by the authority exercised under the state by its courts, in construing the provisions of this same act, under the claim made by this suit. Certain it is, that both the act, and the authority exercised under it, have been examined by and held valid by the court below, and *thereby*, under both the words of the act and the decision of the court below construing the same, we are deprived of our property, as we maintain, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

Here seems to be a proper place to answer another proposition made by counsel, in support of this motion, and the answer will be a continuation of the question, as to what was really the ground of decision below. Counsel, at page 12 of his brief, says:

"The court did not determine upon the validity of the State law, or upon any right asserted under it. It determined that the riparian owner, *having acquiesced* in the action of the state and its grantees, under the same for twenty-five years, and having permitted the state and its grantees, and the United states, to act under the statute, and build and maintain under it, could not now retake in its vastly improved condition, the property taken under authority of statute; that it could not take *its* property and the trust property of the state intermixed with it by the tacit consent of the riparian owner, especially, while there was a valid legal provision for assessment and payment of damages."

Our answer to this is, that there is not a word throughout the whole opinion upon which it can be fairly claimed.

The court below could not have had a thought, even, of deciding the case upon such grounds.

1. There was, and could have been, upon this record, *no tacit consent*, no laches, no acquiescense, because the right to place the dam upon our land, as shown, was in the state, the entry was for the purposes of navigation, and the land owner had no legal right to object.

2. The court does not in terms place its decision upon any such grounds.

3. Our water was never taken, in fact, and we had no reason, until about the time this suit was commenced, to sup-

pose that it ever would be. Tacit consent, acquiescence, or laches, never grow out of such a state of facts. There must be an invasion of right, in fact, open, and known to exist, before acquiescence, tacit consent or laches can be properly claimed. All lawyers know this, or are presumed to know it, much more courts of last resort.

There is not a *fact* stated in the complaint tending to support a claim under the statute of limitations. The *entry* pleaded *was not adverse*, it was by *consent* of the public, in which was the paramount right, the act of 1848 gave that right. All owners of lands lying under the water of navigable streams (not lakes) in the State of Wisconsin, hold the same subject to this paramount right of the public. That they hold to the thread of the stream, see *Jones vs. Pettibone*, 2 Wis. 308, decided in 1853, followed by an unbroken line of decisions down to the present time, among the latest of which are *Olson vs. Merrill*, 42 Wis. 210; *Norcross vs. Griffiths*, 65 Wis. 599; *The State vs. Carpenter*, 68 Wis. 172, from which we quote one sentence, viz: "In this state, at least, there is no such thing as purpresture, even in connection with its navigable waters, where the owner's title to the adjacent banks extend to the center of the stream." (Lakes are not here referred to, as our decisions are the other way with reference to them.)

These decisions are followed by the *Menasha Wooden Ware Company vs. Lawson, et al.*, 70 Wis. 600, decided in January, 1888, where at page 607 the Court says, speaking of the meander line upon this same Fox river; "But this line is not the boundary of the lot, and is run merely to determine the quantity of land contained in it. We are of opinion that the lots (fractional lots, according to government survey), extend to the stream, and of course to its centre." That the title is subject to the public right, see *The Black River Improvement Co. vs. LaCrosse Booming & Transportation Co.*, 54 Wis. 679 to 682 inclusive. We quote from the opinion on pages 679 and 680 as follows, viz:

"It is claimed that the riparian owner on a navigable stream has no right *as against the public*, or persons or corporations acting in behalf of the public, making improvements of such navigable stream, to have the waters of such stream flow in their accustomed course in front of his lands; and this contention on the part of the learned counsel for the appellant, is, we think, sustained by the most learned courts of this country, and that doctrine has been quite clearly sanctioned by several decisions of this court." The opinion then cites

Canal Appraisers vs. The People, 17 Wend. 571.
People vs. Canal Appraisers, 33 N. Y. 461, 500.

and continuing says of them

"These cases were thoroughly discussed by learned counsel, and the opinions delivered were learned and exhaustive of the subject, and in both cases it was held "that riparian owners along a navigable stream are not entitled to damages for any diversion or use of the waters by the state. In these cases the waters were not diverted in order to improve the navigation of the same stream, but to supply the Erie canal, an artificial water-course constructed by the state. *Lansing vs. Smith*, 8 Cow., 146, and many other cases in that state, are to the same effect."

We also quote from the same opinion on pages 681 and 682 as follows, viz:

"These cases and many others hold the doctrine that the waters in a navigable river, or other navigable body of water, are so far the property of the state that the state may control them for public purposes, in their flow or otherwise, without making any compensation to the riparian owners upon the borders of such streams or bodies of water. The flowing waters in such streams are public highways, and such water ways are as much subject to the control of the state for the purposes of the improvement of such ways, as a highway upon the land. The right of the public to raise or lower the grading of a public street without being required to compensate the adjacent owners, is well established by the decisions of this court. (*Dore vs. City of Milwaukee*, 42 Wis. 108; *Harrison vs. Board of Supervisors of Milwaukee Co.*, 51 Wis. 645); and the right to discontinue a highway without making compensation has always been recognized by the law. The right of the riparian owner to have the water of a navigable stream flow past his lands adjoining the same, as they were accustomed to flow, is as perfect against everybody except the state, or some person or corporation standing in its stead, as it is in the case of unnavigable streams; and that right does not, as this court has decided, depend upon his ownership of the soil under the water, but upon his riparian ownership (*Cohn vs. Wausau Boom Co.*, 47 Wis. 314, 322); and the right of the state to control the waters of such streams in the public interest is the same, whether the ownership of the soil under the water be in the state or in the riparian owner.

The doctrine of the cases above cited has, as we think, been fully adopted by this court in all cases where the interference with the waters of a navigable stream has been for improvement of the navigation thereof. Whether this court has decided or will decide that the state may, for any and all public purposes, interfere with the waters of a navigable stream, whereby injury may result to the riparian owner, without making compensation therefor, need not be determined in this

case. The plaintiff represents the state for the purpose of improving the navigation of the Black river, and that which it has done under its charter is complained of by the defendants, we think must be, for the purposes of this action, considered to have been done for the improvement of navigation in said river. And, as against the state, or the plaintiff acting in its stead, we think this court has determined that the riparian owners on the banks of the Black river, or the Black Snake river, have not the absolute right to have the waters of said river flow as they were accustomed to flow, in front of or through their lands. See *Wisconsin River Imp. Co. vs. Lyons*, 30 Wis. 61-65; *Cohn vs. Wausau Boom Co., supra; Stevens Point Boom Co. vs. Reilly*, 46 Wis. 237. In the cases last cited the rights of a riparian owner upon a navigable stream, and the power of the state to restrict, limit or take away such rights, were fully discussed; and this court, after mature deliberation, came to the conclusion that these rights are the subject of legislative control, without making compensation, where they are taken for the purpose of improving the navigation of such stream."

This court decided in the cases of Rundle vs. Canal Co., 14 How. 89, 90, and Barney vs. Keokuk, 4 Otto, 324, that as to these questions, each state decides for itself; and our Supreme Court, in Olson vs. Merrill, *supra*, page 212, commending the decision in the case last cited, says: "This view, so far as may have been necessary, leaves this court free to adhere to a doctrine almost as old as the state, and which it would now be very mischievous to disturb."

That this entry was not adverse, see Jessup vs. Loucks, 55 Pa. St. 350.

Again, there is not one fact stated in the complaint showing that the plaintiff, or those under whom it claim, ever, or at any time, sold or leased any of the water of the river, or ever *used* any of the same, except for the purposes of navigation, and the proofs show (at foot of page 56 of record), that the plaintiff's predecessor, the Fox & Wis. Imp. Co., leased about ten (10) per cent. of the water power at this dam, all upon the plaintiff's side of the river, and none upon the south side; (this was up to Aug. 16, 1866). Also, at page 67, that this dam furnished from 3,500 to 4,000 horse power, and that up to the time of trial, in July, 1886, there had been used thereof by the plaintiff only from 1,200 to 1,500 horse power, and that none of this was used upon the south side of the river.

Therefore, we again say that it does not appear that any question was presented to the court below, in or by the complaint reaching to the taking of our property in this water, except the validity of the Act of 1848, and that it cannot be

presumed that it decided, or intended to decide the case upon the grounds of acquiescence, tacit consent or laches.

IV.

The State is prohibited from depriving a person of his property, without due process of law.

The deprivation must be by *state action*, and in order to show jurisdiction in this court, we must show, and have, as we submit, shown a final judgment, etc., where is drawn in question the validity of a statute of, and an authority exercised under this state, on the ground of their being repugnant to the Constitution of the United States, and that the decision is in favor of the validity of such state statute and state authority.

But here it is said by counsel for defendant in error, that if the taking has been finally consummated by the judgment of our court of last resort, we having appeared to the action then, that the taking must of necessity have been *by due process of law*, because, says same counsel, the decision of the court of last resort of the state, is final as to the construction of statutes of the same state.

There is a clear distinction between the cases cited by counsel for defendant in error (in note 8, page 13 of his argument), in support of this proposition, and the case at bar.

In *Kennard vs. Louisiana*, 92 U. S. 480, the plaintiff in error was deprived of his office, by what this court held to be due process of law, and the judgment of the Supreme Court of Louisiana was *affirmed*.

The *federal question was in the case*, however, and jurisdiction was retained.

Hagar vs. Reclamation District, 111 U. S. 701, was an action in the State Court, to enforce certain liens for the reclamation of swamp lands, and for the sale of the lands to satisfy the charges (p. 704 opinion). The objection (p. 7, opinion), urged against the validity of the assessment was *inter alia*, that the law under which the assessment was made and levied, was in conflict with the Fourteenth Amendment, in that, it deprived the owner of his property, without due process of law. This court held jurisdiction, but *affirmed* the judgment, holding the assessment law to be due process of law, notwithstanding the objection urged against it, and particularly that, that the law furnished no opportunity for the owner to be heard and gave him no day in court.

Davidson vs. New Orleans, 96 U. S. 97, is the *third* case cited in the *Note 8*, and is one of the cases upon which the plaintiffs

in error strongly rely, and where jurisdiction was retained in this court, although the judgment was affirmed. The concurring opinion of Mr. Justice Bradley therein, which is referred to with approval in the opinion (pages 708, 709, in *Hagar vs. Reclamation Dist., Supra*), states the law, as we understand it, as applied to that branch of this case, which affirms that, even if our property was taken for a public purpose, yet that the taking was oppressive and amounted to confiscation, because the act provided no valid mode of procedure, by which, or fund from which we could have obtained compensation for our property so taken.

The concurring opinion states, as it seems to us, the true doctrine, viz: "It seems to me that private property may be taken by a state, without due process of law in other ways than by mere direct enactment, or the want of judicial proceeding. If a State, by its laws should authorize private property to be taken for public use, without compensation (except, etc.,) I think it would be depriving a man of his property, without due process of law. The exceptions noted imply that the nature and cause of the taking are proper to be considered. * * * * * The article is a restraint on the legislative as well as the executive and judicial power of the government, and cannot be so construed as to leave Congress free to make any process—'due process of law'—by its mere will. I think, therefore, we are entitled, under the Fourteenth Amendment, not only to see that there is some process of law, but 'due process of law,' provided by the state law, when a citizen is deprived of his property; and that in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, *or none of these*, and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.' * * *

Walker v. Sauvient, 92 U. S. 90, (the last case cited in note 8) was an action to recover against a licensed keeper of a coffee house in New Orleans, for refusing refreshments to the plaintiff, a man of color. The jury having failed to agree, the case, or the question of fact therein, was decided by the trial judge. Walker, the defendant below, objected in the trial court that the act was unconstitutional, *but without specifying in what particular.* Judgment was rendered against him. That judgment was affirmed upon appeal to the Supreme Court of the state, and afterwards taken to the Supreme Court of the United States for re-examination. After stating the federal question, this court uses, in the opinion, this language,

and it is that upon which counsel, in support of this motion, relies: "All questions arising under the constitution of the state *alone*, are finally settled by the judgment below. We consider only such as grow out of the Constitution of the United States."

But, if your honors please, that is *not* an assertion that if the provision which is contravened, or sinned against, is the same in both constitutions, that then this court is without jurisdiction! Nor is it an assertion that when the State Court places an entirely inadmissible construction upon the act or law of the state, or the ordinances of a municipality, acting in the place of or as an agent of the state, and thereby causes those laws or ordinances to conflict with an inhibition of the United States Constitution, that then, or in such case, this court has no jurisdiction to re-examine such construction, and to construe and interpret for itself! A late case, involving the right of this court to construe for itself, and where the judgment of the state court was reversed, and solely upon the ground of such an inadmissible construction by the court below, is *Yick Wo vs. Hopkins*, 118 U. S. 356. It was there (as here) contended by counsel in argument, that "the state may construe her own laws." But this court, following its own well-defined line of decision, rejected the claim, construed for itself and reversed the judgment.

This proposition as to the finality of the judgment below, was made in, and ruled against by this court, years ago. In *Jefferson Branch Bank vs. Skelly*, 1 Black p. 443, this court says: "Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract, and within the protection of the Constitution of the United States. * * * *

In *Bridge Proprietors vs. Hoboken Co.*, 1 Wall p. 144, the same doctrine is asserted in these words: "It is said, however, that it is not the validity of the act of 1860, which is complained of by the plaintiffs, *but the construction* placed upon that act by the State Court. If this construction is one which violates the plaintiff's contract (or, as here, which takes our property for a *private* purpose, or indeed for a public purpose, without any valid provision in the act, whereby, or under which we may obtain "just compensation"), and is the one on which the defendants are acting; *it is* clear that the plaintiffs (there defendants here), have no relief except in this court, and that this court will not be discharging its duty to see that no state leg-

islature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction in such cases."

The opinion, at page 145, quotes from and approves the decision, in *Bank vs. Skelly, supra.*

In *McMillen vs. Anderson*, 95 U. S. pp. 37 to 42, Miller J. in opinion, discussed the question as to how far the decision below is controling as an adjudication, upon or as a construction of a state statute, and the same doctrine was held, that *as to the very ground* of error in a judgment of a state court, on accont of which a writ of error lies to this court, the adjudication below is not conclusive.

From this review of the decision of this court, it is entirely certain that this court has power and jurisdiction to construe this act of the State of Wisconsin for itself, and that the proposition of counsel for defendant in error that the judge ment below is, in itself, 'due process of law,' is incorrect.

Again, counsel for defendant in error (pp. 13 and 14, brief) states, as a proposition of law, that: "If it is contended that it (our water power) was taken by the Act of 1848, then it was taken by legislation, over which this court has no supervision. If by this is meant, and we can see no other meaning, that the Fourteenth Amendment can have no retroactive operation, then the answer is obvious. That amendment prohibits a state from both making and *enforcing* any law which shall abridge the privileges or immunities of citizens * * * *nor shall* any state deprive any person of * * * property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It matters not when the state law was made under which the state assumes to act, the inhibition is for the future. Suppose that there still remains unrepealed some old law upon the statute book of one of the states, which deprives, in terms, some of its citizens of the right, equally with others, to pursue a legal avocation, or of liberty of person, can it be said that the Fourteenth Amendment is not effectual to prevent the state from *enforcing* such former law?

It is submitted that counsel mistakes the decisions, or fails to see the proper distinction.

This court points out clearly in *New Orleans Water Works vs. Louisiana Sugar Co.*, 125 U. S. 30, this distinction. In the one case the inhibition is, that no state *shall pass* any law impairing the obligation of contracts. There the act must be *passed* after the contract is perfected. In the other, under the Fourteenth Amendment, the state shall not at any future time whether by enforcing an old law or in any other manner, deprive one of his property without due process of law.

V.

In closing, we will as briefly as possible, state our position as to the right for which we contend. It is said, in *Hoadley's Administrators vs. San Francisco*, 124 U. S. 644, that when a cause is brought from a State Court, the first duty of this court is to inquire "*whether there is* * * * * *such right of property, as is alleged.* The existence of the * * right is part of the federal question itself."

If such is the duty of the court, it would seem to be the duty of counsel also.

The cases of *Webb vs. Portland Man'f. Co.*, 3 Sumner 189; *Stilman vs. White Rock Man't. Co.*, 3 Woodbury & Minot 543, and *Parker vs. Griswold*, 17 Conn. 288, define the water rights of the plaintiff in error with precision. We own a valuable power at the point in question, although our land extends only to the thread of the stream.

This ownership is subject only to the paramount right of the public for the purpose of navigation. The state has anticipated us in the erection of the dam, still we had and yet have the legal right to dam the stream at this point, if the State or United States removes the present dam and discontinues navigation. Our rights are thus perfect. If we have lost them, it is under the construction, which our court has placed upon the Act of 1848.

The canal law, Act of 1848, came to Wisconsin directly from Ohio. Ohio took it from the State of New York, where it was first enacted, in 1816, and by various amendments down to that of April 5, 1823. (Vol. 6, Laws of New York, page 132), was perfected and in force at the time of the decision in *Varick vs. Smith*, 5 Paige 146, on which we rely, *inter alia*, as determining that our water is, by the judgment of our Wisconsin court, taken for a private purpose.

Ohio commenced its legislation upon this subject, if we mistake not, by its act of February 23, 1820. (2d Chase's Statutes, p. 1131.)

This act was frequently amended, and added to, year by year, until March 4, 1836, when the name of the state agency was changed from "Commissioners" to "Board of Public Works." In March, 1838, (36 Ohio Laws, p. 63,) the name was changed back to "Commissioners." By Act of March 5, 1839, page 45 Gen. Laws of Ohio, vol. 37, page 45, the Board of Public Works was reinstated.

These acts, both of New York and Ohio, were in all essential particulars, so far as power to take private property was concerned, identical with ours of 1848. That ours was copied from one or the other is shown by reading the first line of section 5 thereof, where the "*said commissioners*" are directed, etc.,

while the control of the work is by the first section placed in the "Board of Public Works," a mistake which evidently occurred in copying.

These facts are stated to show to your Honors that our law came from one or both of those states, and that long before its enactment here, it had received the construction and interpretation by the courts of both of those states, which we contend for in this cause.

In both of those states the power to take private property was limited, substantially as it is here, *by what was necessary*.

Section 15 (page 61, Laws of State of Wis., 1848) is as follows:

"In the construction of such improvements, the said board shall have power to enter on, take possession of and use all lands, waters and materials, the appropriation of which for the use of such works of improvement shall, in their judgment, be necessary."

In Ohio, in 1840, the case of *Buckingham vs. Smith & Dilke* was decided. (10 Ohio, 288.)

The action was in equity, by lessees of water, to restrain land owner from further prosecuting an action for damages for diverting water through the feeder, the complainants claiming under a lease from a canal commissioner. The bill was dismissed by the Supreme Court. In the course of the opinion, the doctrine for which we contend is stated as follows:

"The state, notwithstanding the sovereignty of her character, can take only sufficient water from *private streams* for the purposes of the canal. So far, the law authorizes the commissioners to invade private right as to take what may be necessary for canal navigation, and to this extent, authority is conferred by the constitution, provided compensation is paid, etc. * * * We know of no instances in which it has, or can be taken, even by state authority, for the mere purpose of raising a revenue by re-sale or otherwise, and the exercise of such a power would be utterly destructive of individual right, and break down all the distinctions between *meum et tuum*, and annihilate them forever at the pleasure of the state. (citing *Cooper vs. Williams*, 5 Ohio 393). The uses of the waters of private streams belong to the owners of the lands over which they flow. They are as much individual property as the stones scattered over the soil. If such stream can be passed with boats and rafts, the public has the right of passage; but subject to such easement, the owner of the land may appropriate the use of the water in his own discretion. * * * It follows, if such waters should be taken by the state for the mere purpose of creating hydraulic power, and to rent it to an individual, the transaction would be illegal,

and no title would pass, as against the owner. In conducting water through the feeder, a discretionary power must necessarily rest in the agents of the state, and in making provision for a supply, it must frequently occur that a surplus will accumulate, and it was the right to the use of this *surplus* water which the lease conveyed.

Cooper vs. Williams, 4 Ohio, 254, was a case where water, having been introduced into a feeder at an elevated point, was, *while on its way down to the canal*, utilized for hydraulic purposes, no more water being introduced into the feeder than was necessary for the supply of the canal. The court held that such *accidental water power* was just such as the canal law referred to, that the land owner was in no way injured, the original taking having been from the river for a public purpose, and no more water having been taken through the feeder than was necessary for navigation.

Upon a bill of review, the above case is reported again, 5 Ohio 392, (A. D. 1832) where the court *asserts the power* of the *judiciary* to interfere and prevent the canal commissioners from withdrawing more water from the river than was necessary for canal purposes, and at pages 392 and 393 states the doctrine for which we contend, but in deciding the case *held* that there was no evidence that any *surplus* water was withdrawn from the river, therefore, the bill was dismissed.

The opinion, however, contains this language: "But as the *public welfare* does not require that any more (water) should be withdrawn from the river than is necessary for the navigation of the canal, *no more can be taken;* and should an attempt be made to take more, this court might prevent it by injunction.

It is true that the Supreme Court of Wisconsin arrived at a different conclusion, and held that the immense surplus of water in the Fox river, above what was necessary for navigation, was required *by the public for the welfare thereof*, and it is of that erroneous construction of the Act of 1848 of which we complain. Construed, as we think the act should have been, it would have carried, *inter alia*, all such water powers as were *actually created* (where none existed before) by any such dam or other improvement, such an one, for instance, as was *created* by the construction of the feeder as held in *Cooper vs. Williams, supra;* there the whole body of water flowing in the feeder down to the level of the canal, was utilized by daming and passing the water through wheels for hydraulic purposes. By such a construction private rights would not have been invaded, and this writ of error would not have been necessary.

McArthur vs. Kelly, 5 Ohio 141, 152, holds substantially the same doctrine.

Neither the Constitution of Ohio or New York contained any prohibition against engaging in works of public improvement, therefore, in those states, the public credit stood behind any *lawful* appropriation of private property for the public use, but even there and under such circumstances, private property could not be taken for private purpose.

At page 149, in the opinion of the court, in *McArthur vs. Kelly*, *supra*, the following language is used:

"There is nothing in this, or any other act, from which an inference can be drawn that the legislature intended that the commissioners should seize on the property of any, to sell or rent it, to pay the proceeds into the state treasury, or any department of it" * * * The opinion continues on to page 152, reasoning out the proposition that the state had no power to take the property of a citizen for the purpose of sale or lease, in order to obtain the wherewith to pay for building the canal. That must be done from funds legally provided by the state, by taxation or otherwise. Here, in Wisconsin, under her constitutional limitation, the construction could only be accomplished from or by sale, or other use of the lands granted and the revenues of the canal, when completed.

The New York cases are to the same effect.

Varick vs. Smith, 5 Paige 158-159.
People vs. Platt, 17 John. 195, A. D., 1819.
Hooker vs. Cummings, 20 John. 90, A. D., 1822.
Rogers vs. Jones, 1 Wend. 237, A. D., 1828.
Ex parte Jennings, 6 Cowen 518, A. D., 1826.
Commissioners vs. Kempshall, 26 Wend. 404, A. D., 1841.

The above were all decided prior to the date of the enactment of our law of Aug., 1848, and are followed and affirmed in Smith vs. City of Rochester, 92 N. Y. 463-481.

But notwithstanding the fact that these decisions were most of them made before the act was enacted here, and according to an unbroken line of decisions of our Supreme Court came with and interpreted it here (*Dutcher vs. Dutcher*, 39 Wis. 651; *Westcott vs. Miller*, 42 Wis. 434), yet by the decision below, our court refused to follow them, and so construed the act as to cause it to conflict with the Fourteenth Amendment.

The reason given in the opinion for declining to hold that the taking was for a private purpose is, that it "was necessary in order to give the state the absolute *control* of the improvement" (page 89, record) * * . "It was of vital interest,

therefore, to the state, that it or the corporation, to which it entrusted the preservation and maintenance of the improvement should have the *entire and absolute control* of the dam, embankments, canals and all appliances necessary for the purposes of navigation, as well as of the waters in the pond, created by the dam. It would be a serious detriment to the public interest, were each riparian owner entitled to cut the dam "(no one on our side or part has ever claimed such right), or the embankment, which is a part thereof, and draw water from the pond," etc., etc.

All of these propositions may be conceded and not touch the question of ownership.

Those are now, and ever since 1872 have been, questions entirely between plaintiff in error and the United States Government. We have its consent to the cutting of the embankment, otherwise we could not have cut it. The case of *Varick vs. Smith, supra*, notices that difficulty, but it does not intervene between the parties to this record.

We respectfully submit that there never was the slightest difficulty in dividing the water of this river, either theoretically or practically; all that the public ever needed or now needs passes into the canal, what there is above that flows freely over the dam. That there never was any embarassment in this respect is clearly shown by the fact that the government saw no necessity for the ownership of the whole water, nor did it see or anticipate any inconvenience in taking conveyance of the improvement, simply. The actual practical working of such divided ownership of water creates no friction between the government and land owner. When too much water is drawn out of the canal, all that is necessary for the government to do is shut the headgates of those mills which are so drawing water—one single man is sufficient for that purpose and always was.

Much discussion has been had upon the question as to what is meant by the term "necessary" in such connection, but while the decisions fail to lay down any rule which covers all cases, it never has been extended to conveniences merely. See:

Camden & Amboy R. R. Co. vs. Mansfield, 23 N. J., Law 510.
State vs. Hancock, 35 N. J., L. 545.
Nashville & C. R. R. vs. Cowardin, 11 Humph. 350.
Olmsted vs. Prop. of Morris Aqueduct, 47 N. J., Law 326–327.

Within the above decisions we have no hesitation in affirming that the taking of more water into the canal at Kaukauna by the defendant in error than was sufficient at all times to fill the

same for the purpose of navigation was not necessary, neither was it useful or convenient. It constantly caused more strain, wash and wear upon the banks, and was in no way essential to the full and complete control by the state, and later on by the United States of the river, the canal, the dam and all appliances used in connection therewith for navigation purposes. Hence, we say again, that our property has been taken for private use, by and under the Act of 1848, as affirmed by the judgment below, and, consequently, in contravertion of the prohibitions contained in the Fourteenth Amendment of the Constitution of the United States, and we respectfully submit that the motion to dismiss should be denied.

DAVID S. ORDWAY,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 701.

THE KAUKAUNA WATER POWER COMPANY, ET ALS.,
PLAINTIFFS IN ERROR,

vs.

THE GREEN BAY & MISSISSIPPI CANAL COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF OUTAGAMIE COUNTY, WISCONSIN.

BRIEF OPPOSING MOTION TO DISMISS WRIT OF ERROR.

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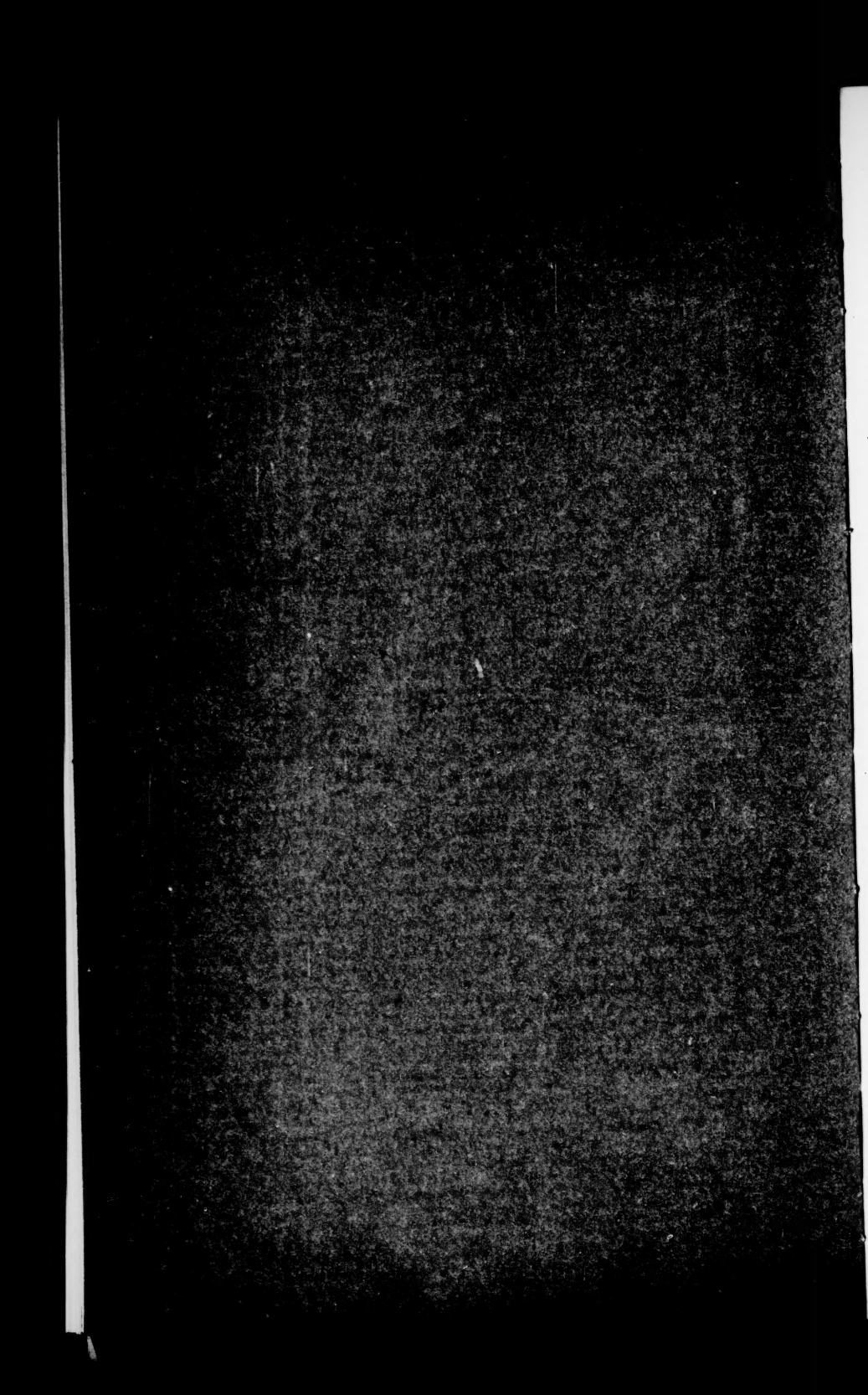

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Brief of Plaintiffs in Error Opposing Motion to Dismiss Writ of Error.

For convenience the Kaukauna Water Power Company, the principal plaintiff in error (all others claiming under it), will be hereinafter designated as "Water Power Company," and the defendant in error will be designated as "Canal Company."

STATEMENT.

Congress, by act approved August 8, 1846, granted certain lands to the state of Wisconsin, on its admission into the Union, for the purpose of improving the navigation of the Fox and Wisconsin rivers, and constructing a canal to unite them. By act approved June 29, 1848, the legislature of Wisconsin assented to the act of Congress granting such lands, and by act entitled, "an act to provide for the improvement of the Fox and Wisconsin rivers and connecting the same by a canal," approved August 8, 1848, created a Board of Public Works to superintend the construction of the improvements contemplated by the act of Congress, and defined the powers of the Board, as well as the manner of disposing of the lands so granted. Section 16 of said act was as follows:

"SEC. 16. When any land, waters or materials appropriated by the Board to the use of said improvements shall belong to the state, such lands, waters or materials, and so much of the ad-

joining land as may be valuable for hydraulic or commercial purposes, shall be absolutely reserved to the state, *and whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water power shall belong to the state, subject to future action of the legislature.*"

The Board were limited by the act in their contracts and expenditures to the proceeds derived from the sale of the lands granted by Congress, and this was undoubtedly in compliance with section 10, article 8 of the state constitution, which prohibits the state from contracting any debt for works of internal improvement, or carrying on such works, except as agent or trustee to give effect to grants of land or other property to the state for particular works of internal improvement. May 14th, 1851, the state made a contract with Morgan L. Martin, for the improvement of the Fox River, between Lake Winnebago and Green Bay. At Kaukauna, in township 21, north of range 18 east, were rapids in the Fox river, and the navigation at this point had to be improved by the construction of a dam across the river to secure slack water, and of a canal leading therefrom on the north side of the river to a point below the rapids. In 1853, under chapter 98 of the general laws of Wisconsin for that year, the Fox and Wisconsin Improvement Company was organized and undertook the improvement of the navigation of the Fox and Wisconsin rivers, as contemplated by the said act of Congress, granting lands to the state. The state transferred to this company all of its rights and property in the contemplated improvement and in the lands granted by Congress, upon certain terms and conditions and authorized the company to go on and complete the improvement. The improvement company continued the contract made between the state and Martin, until 1855 or 1856, and Martin constructed the dam and canal at Kaukauna for the Improvement Company under that contract. He commenced getting out material for the construction of the dam, in the fall of 1854, but did not enter upon the bed of the stream for its construction, until 1855, and completed it that year. No work was done upon the south bank of the river, at this point, until the fall of 1854 or spring of 1855, and about the first thing to be done on this bank, was the making of the embankment hereinafter mentioned. The south end of the

dam abutted upon government lot 5, in section 22, township 21, north of range 18 east. An embankment had to be constructed from this end of the dam up stream, along the margin of the river, upon lots 5, 6 and 7, of said section 22, to prevent the water raised by the dam from overflowing the adjacent land.

Said lot 5, which borders the river, was entered by one, Garrit V. Denniston, from the United States, September 1st, 1835. He afterwards assigned his duplicate therefor to Joshua Hathaway, Jr., who received a patent from the United States dated August 10th, 1837, which patent did not subject the land conveyed thereby to any easement in aid of the improvement of the river. Hathaway's title to this land, through several mesne conveyances, became vested in the Water Power Company on the 14th of May, 1880, and it still holds said title to all that part of said lot lying northerly or northeasterly of the railroad track running near and parallel with the southerly bank of the canal, as shown upon the map of Ledyard, in the record, said Water Power Company's title covering all that part of said lot bordering upon and underneath said river.

The title to lots 6 and 7, sold by the United States September 1st, 1835, and patented August 10th, 1837, became and is now vested in the Water Power Company, subject to a certain release, given by one John Hunt, to the Fox and Wisconsin Improvement Company (copy on page 20 of record); but such lots and title are not pertinent to the questions here involved, as said lots adjoin lot 5 on its up stream side.

In the year 1866, pursuant to chapter 289 of the general laws of Wisconsin for 1861, the Canal Company was organized and became vested with all the property, rights, powers, privileges and franchises of the Fox and Wisconsin Improvement Company, under and by virtue of the foreclosure of a certain mortgage or trust deed given by said Improvement Company.

Pursuant to acts of Congress, an act of the legislature of Wisconsin and the award of arbitrators, said Canal Company, by deed bearing date September 18th, 1872, conveyed to the United States of America "all and singular, its property and rights of property, in and to the line of water communication between the Wisconsin river and the mouth of the Fox river, *including its lots, dams, canals and franchises*; saving, excepting and reserving therefrom, among

other things, the water powers created by the dams and by the use of the surplus waters not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto, and the lots, pieces or parcels of land necessary to the enjoyment of the same, and those acquired with reference to the same; all subject to the right to use the water for all purposes of navigation." The said dam and other works of the improvement at Kaukauna, were included in such conveyance. The water powers and other property *excepted* by the Canal Company from this conveyance were simply not sold to the United States, and no consideration whatever passed from the United States to the Canal Company therefor or in relation thereto, and the United States made no covenants or agreements and assumed no obligations or burdens as to said *excepted* property.

The United States, after such conveyance and about the year 1875, constructed a new dam across the river at Kaukauna upon a new location below said old dam, the southerly end of which new dam was landed upon said lot 5 about 40 feet below the old dam, and the northerly end of said new dam was about 111 feet below the old dam. It also extended the embankment upon said lot 5 along the margin of the river on the south bank to the new dam. After the construction of the new dam the old one was abandoned and suffered to go to decay.

Neither the State of Wisconsin, the Fox and Wisconsin Improvement Company, the Canal Company nor the United States ever acquired any interest in or title to any portion of said lot 5 by condemnation proceedings, or by purchase or grant from any of the owners of said lot. (See finding of Circuit Judge, record, page 48, and the finding of the State Supreme Court, record, page 86.)

The Improvement Company never used more than ten per cent. of the water power created by the Kaukauna dam, and whatever it did use was on the north side (record, page 56), and the Canal Company has never used one half of the water power created by this dam, and whatever it has used has also been through the improvement canal on the north side of the river (record, page 67). Neither of said companies ever owned any land upon the south side of the river upon which they could use any of the water power created by the Kaukauna dam.

In 1881 the Water Power Company (being the owner of all the land bordering the river on its southerly side from and including said lot 5 to a point more than three thousand feet below said lot), constructed a canal for hydraulic purposes upon its own land on the south side of the river at Kaukauna, and cut the same through said embankment upon said lots 5 and 6 for the purpose of drawing water from the pond or reservoir created by said dam, and has since the construction of said canal drawn water for hydraulic purposes from said pond. It also constructed in said canal, near the point where it opens into said river, substantial bulkheads and head-gates, of sufficient height, depth and strength to retain the water in said river as effectually and to the same height that it was retained by said embankment along the margin of the river. Said defendant's canal is about 2,500 feet long and has a head of water for hydraulic purposes of 14 feet just below the headgates, increasing gradually to 24 feet at the lower end of the canal.

The Canal Company brought this action against the Water Power Company, and others claiming under it, in the circuit court for Outagamie County, Wisconsin, to restrain them from drawing water froms aid pond through said canal, and incidentally to compel the Water Power Company to restore and rebuild the embankment which it had cut through and destroyed in reaching said pond with its canal.

It based its action upon the claim *that under the state it was the owner of and had the right to the exclusive use of all the hydraulic power created by the Kaukauna dam, subject only to the rights of navigation.*

The Water Power Company, on the contrary, claimed at the time it built its canal, and has always and does now claim *that as the riparian owner of said lots 5, 6 and 7* (its title subject only to the public right of navigation, extending to the thread of the river under the uniform decisions of the highest court of the state), *it was also the owner of and had the right to use one-half of the water of said river and the hydraulic power arising therefrom created by said dam, subject only to the rights of navigation.*

This court probably cannot take cognizance of any questions relating to lots 6 and 7, by reason of the effect given by the State Supreme Court, to the Hunt release upon those lots, but all ques-

tions remain as to lot 5, which practically covers the whole controversy, as the dam in question abuts upon that lot and its ownership involves the right to the water power created by the dam.

The circuit court, after a full hearing and trial, gave judgment for the defendants, dismissing the complaint upon the merits. From this judgment the Canal Company appealed to the Supreme Court of Wisconsin, which court, after a full hearing and argument of the case upon a record containing all of the testimony taken in the court below, reversed the judgment of the circuit court.

As preliminary questions and for the purpose of showing what is properly a part of the record to be examined by this court in determining the question of its jurisdiction, we submit the following:

(a.) Under the constitution of Wisconsin, the Supreme Court of that state is required to try equity cases *de novo*, and to determine the questions of fact as well as of law where the record brings up all of the testimony submitted to the lower court. In such cases it is therefore quite immaterial as to what may have been the findings of the lower court upon the law and facts.

Catlin vs. Henton, 9 Wis. 476.
Felch vs. Lee, 15 Wis. 265.

We quote the following from the opinion of the court in the latter case, at page 269:

> "We have frequently decided that in equity cases, the finding of facts by the court below was not conclusive, but that we would look into the testimony and determine what facts were established by it. This must be so, since the constitution gives this court appellate jurisdiction of cases at law and equity, and by the well established rules of practice, the appellate court reviews the evidence in equity causes in the same manner as the court of original jurisdiction. In common law cases the rule is otherwise."

On page 80 of record, and near the end of the bill of exceptions, we find the following as a portion of the certificate made by the trial judge of the lower court: "The foregoing is a true bill of

exceptions in the foregoing entitled case, and contains all the evidence produced by either of the parties to said action."

The plaintiffs in error had no occasion to assign errors in the Supreme Court of Wisconsin, as the judgment of the court below was in their favor on the merits, and they did not take the appeal. It having been the duty of the State Supreme Court to try this case *de novo*, we may safely conclude that its opinion in the case is its finding of the facts and law. This point seems to fully answer and render inapplicable to this case all of the suggestions contained in the brief of counsel for defendant in error from folios 18 to 23.

(b.) The decisions and opinions of the Supreme Court of Wisconsin are made a part of the record in the action or proceeding in which they are given by the statute. We quote section 2410 of the Revised Statutes of Wisconsin for 1878:

> "SEC. 2410. The Supreme Court shall give their decisions in all cases in writing, which shall be filed with the other papers in the case; and such decisions, and all decisions and opinions delivered by the court or any judge thereof, in relation to any action or proceeding pending in said court, shall remain in the office of the clerk. *Every written opinion or decision of the Supreme Court, which shall have been filed with the clerk, shall constitute and be held a part of the record in the action or proceeding in which it shall have been given and filed, and shall be certified therewith to any court of the United States to which such action or proceeding, or the record thereof, may be in any manner certified or removed.* The state printer shall print for the use of the justices so many of such decisions and opinions, and at such times, as shall be directed by them."

We also refer the court to sections 2411 and 3071 same Revised Statutes. Under these statutes and the following decisions of this court, the opinion of the Supreme Court of Wisconsin in this case is clearly a part of the record to be examined by this court in determining the question of its jurisdiction.

Delmas vs. Insurance Co., 14 Wall. 661–667.
Murdock vs. City of Memphis, 20 Wall. 590–633.
Gross vs. United States Mortgage Co., 108 U. S. 477.

Kreiger vs. Shelby Railroad Co., 125 U. S. 39–44.
Kidd vs. Pearson, 128 U. S. 1–15.

The judgment brought up for review on this writ of error, and found on pages 96, 97 and 98 of record in terms, makes the opinion of the Supreme Court a part of said judgment. The decision or remittitur from the Supreme Court is recited in the judgment, the latter part of which is as follows: "And that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to give judgment for the plaintiff, *as indicated in and by the opinion of this court:*" Then follows this recital: "And opinion of said Supreme Court being on file herein." And further on in the judgment we find the following: "Now, on motion of Moses Hooper, attorney for the plaintiff, *and pursuant to the said decision and opinion of said Supreme Court*, it is here by this court ordered and adjudged," etc.

The foregoing quotations are found on page 97 of record.

(c.) The Constitution of the State of Wisconsin has always contained a provision, which, although different in form, is the same in legal effect as the "due process of law" clauses in the 5th and 14th amendments to the Constitution of the United States.

We refer to section 9, article 1 of said constitution, which is as follows:

> "SECTION 9. Every person is entitled to a certain remedy in the laws, for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay, *conformably to the laws.*"

Article 2, of the ordinance of 1787, for the government of the territory of the United States northwest of the river Ohio, contained the following:

> "*No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land.*"

Section 12, of the Act of Congress, approved April 20, 1836, entitled "An act establishing the territorial government of Wiscon-

sin," 5 United States Statutes At Large, page 10, provided that the inhabitants of said territory should be entitled to and enjoy all and singular the rights, privileges and advantages granted and secured to the people of the territory of the United States northwest of the river Ohio, by the articles of the compact contained in the said ordinance of 1787, and should be subject to all the conditions, restrictions and prohibitions in said articles of compact imposed upon the people of said territory. It was therefore the law of the territory of Wisconsin, at the time of the adoption of the State Constitution, that no man should be deprived of his liberty or property, but by the judgment of his peers or the law of the land.

The above Section of the Wisconsin Constitution has been construed by the Supreme Court of that state, and noticeably in *Durkee vs. City of Janesville*, 28 Wis. 464.

Osborn. vs. Hart, 24 Wis. 89.
Taylor vs. Porter, 4 Hill 140.
Cole vs. La Grange, 113 U. S. 1.

Sec 13, article 1, of the Constitution of Wisconsin, is as follows:

"*Section 13. The property of no person shall be taken for public use without just compensation therefor.*"

FEDERAL QUESTION.

The federal question claimed is that plaintiffs in error have been deprived of their property without due process of law, by the State of Wisconsin, through the agency of its Supreme Court in giving effect to and enforcing a void statute of the state, in contravention of the fourteenth amendment to the Constitution of the United States.

The part of section 709 of the United States Revised Statutes, under which the jurisdiction of this court is asserted, is the following:

"Or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity."

The statute of the state, the validity of which is drawn in question, is that part of section 16 of the act of August 8, 1848, providing for the improvement of the Fox and Wisconsin rivers, and connecting the same by a canal, which reads as follows:

"*And whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water power shall belong to the state, subject to future action of the legislature.*"

Its invalidity was claimed upon two grounds:

First. That it purported to take private property for a private purpose, which is not only prohibited by the Constitution of the State of Wisconsin, but also by a law which is higher and above all constitutions, and therefore that it was not *due process of law*, and

Second. That if it was held to be the taking of private property for a public purpose, it was void under the constitution of the state, and not *due process of law*, because said act of 1848 did not, neither did any other act of the legislature of Wisconsin, provide a way and means for ascertaining and making the compensation that should be paid for the property so taken.

That the act of 1848 made no provision for compensating the owners of property taken for the purposes of the improvement, was decided by this court in *Pumpelly vs. Green Bay Company*, 13 Wall. 166, and by the Supreme Court of Wisconsin in *Jones vs. U. S.*, 48 Wis. 385, *Sweaney vs. U. S.*, 62 Wis. 396, and also in the case at bar.

We make the following quotations from the opinion of the Wisconsin Supreme Court in this case (record, page 91):

"The act of 1848 is certainly liable to the criticism that it makes no adequate provision for compensating the owners of property taken for the improvement." * * * * * * * *

"*But the act of 1848 failed to give the land owner the right to institute condemnation proceedings under it, to have his compensation determined;* and if the state should institute such proceedings,

the compensation, when determined, was, by section 21 of the act, made payable out of the fund appropriated to such improvement." * * * * * "The history of the improvement during the time it was in the hands of the board of public works and of the Fox and Wisconsin Improvement Company, *shows that the improvement fund was a very uncertain source to rely upon for the payment of a debt charged upon it.* No other provision was made in the act of 1848 or in any other act of the legislature, for the condemnation of property to the use of the improvement, or for payment therefor. In view of these serious defects in the law, *and especially because the owner of the property taken for the purposes of the improvement was powerless to institute proceedings to have the compensation ascertained to which he was entitled*, Mr. Justice Orton said in Sweaney vs. U. S., 62 Wis., 396, 22 N. W. Reporter 609, that until the act of Congress of 1875 there was no provision of law for the ascertainment and payment of the damages, and compensation for the taking of lands, by flowage or otherwise, for the use of the improvement. Looking to the practical operation of the statute, the statement thus made is substantially correct, although perhaps inaccurate in theory and form."

That so much of the act of 1848, as purported to authorize the taking of private property for the purpose of the improvement, was repugnant to the constitution of the state, and therefore void, because it made no provision for compensating the owners of such property therefor, we cite the following cases decided by the Supreme Court of Wisconsin:

Norton vs. Peck, 3 Wis. 714.
Robbins vs. Railroad Co., 6 Wis. 636.
Shepardson vs. Railroad Co., 6 Wis. 605.
Powers vs. Bears, 12 Wis. 213.
Loop vs. Chamberlin, 20 Wis. 135.
Sherman vs. Railroad Co., 40 Wis. 645.

The law, that private property cannot be taken for private use, and also that it cannot be taken for public use, without just com-

pensation, existed long before the adoption of the constitution of Wisconsin. It was and is the ancient and customary law of the people, necessarily attaching to the just distribution, ownership and enjoyment of property—in other words, it was and is the law of the land independant of the state constitution.

FEDERAL QUESTION RAISED AND PRESENTED.

The following quotations from the Canal Company's complaint in this action, show that it based its alleged title to the water power in question upon said act of August 8, 1848 and especially upon that part of section 16, last above quoted.

Quotation from complaint, on page 2, of record:

> "That the State of Wisconsin, by an act approved August 8, 1848, undertook the improvement of the Fox and Wisconsin rivers and the sale of said lands and the application of the proceeds thereof to the use for which the same had been granted, and in said act provided for a board of public works to superintend the completion of such improvement." "In said act the said state of Wisconsin provided that, 'whenever a water power shall be created by reasonof any dam erected or other improvements made on any of the said rivers, such water power shall belong to the state, subject to the future action of the legislature.' *By this act the state of Wisconsin appropriated to its own use and the use of its assigns and successors the water power of the said Fox river, which should thereafter be made available by dams erected in the business of improving said Fox river.*"

Quotation from complaint on page 3 of record.

> "That said dam (meaning the dam in question), was built and maintained under the authority of said act of the State of Wisconsin, approved August 8, 1848, and amendatory acts, providing for the completion of such improvement, and that there is no other authority for building or maintenance of the same."

Following certain allegations that the state had granted certain property to the Fox and Wisconsin Improvement Company, we find the following on page 4 of record:

"That among the property so passed to and vested in said Fox and Wisconsin Improvement Company were the said canals locks and dam in town 21, range 18, and the hydraulic power furnished by said dam; that said dam and canals were then nearly completed. Also the following: "*That said dam furnished from the mill pond sustained by the same a large and very valuable hydraulic power, which is one of the powers mentioned in the act of the State of Wisconsin approved August 8, 1848.*"

Then follow allegations that the said Fox and Wisconsin Improvement Company executed a mortgage to certain trustees upon all its rights, property and franchises, including its alleged title to the water power in question, and that through a foreclosure of said mortgage, the plaintiff became vested with all such property.

Quotation from complaint on page 9 of record:

"That this plaintiff is the owner of and entitled to the exclusive use and control of the water power or hydraulic power supported and maintained and furnished by the above mentioned dam across Fox river, subject only to the right of the United States government to draw only so much water therefrom as is necessary to fill the canal on the north side of said river, leading from the pond above said dam to the river below said dam, for the purposes of navigation only, as specified in said conveyance from this plaintiff to the United States."

We now make certain quotations from the answer of the plaintiffs in error to said complaint:

Quotation from answer on page 16 of record:

"And these defendants deny all that part of said complaint in folios 6 and 7 thereof, which is in these words: 'By this act the state of Wisconsin appropriated to its own use and the use of its assigns and successors the water power of the said Fox river, which should thereafter be made available by dams erected in the business of improving said Fox river; that such appropriation was necessary to secure the improvement of said rivers, and to prevent the application of the proceeds of the public lands granted as aforesaid from being expended upon dams which should furnish hydraulic power to private parties, owners

of the lands bordering on the banks of said Fox river, and thus be substantially diverted from the use for which they had been granted."

Quotation from answer on page 17 of record:

"And these defendants deny that all the hydraulic power furnished by the said dam so built in township 21, range 18, passed to said Fox and Wisconsin Improvement Company by said transfer of 1853, or in any other way, and on the contrary thereof, state, upon information and belief, that none of the hydraulic or water powers upon or appurtenant to the south or southerly shore, or bank of said said river, and furnished by said dam, ever passed to or were owned by said Fox and Wisconsin Improvement Company."

Quotation from answer on page 19 of record:

"And these defendants deny that said plaintiff is, or, at the time of the commencement of this suit was, the owner of and entitled to the exclusive use and control of the water power or hydraulic power supported, maintained and furnished by the said dam, subject only to the rights of the United States government, as stated at folio 46 in and of said complaint; *and they further deny that the plaintiff has or ever had title to or possession of said canal, dam and embankments for the purpose of using all surplus water drawn or to be drawn from said pond over and above the amount necessary for use in navigation.*"

"And these defendants state that the said plaintiff does not and never did own or have any interest in, as lessee or otherwise, any land or lots, vacant or otherwise, lying on the south or southerly bank, shore or side of said Fox river, in either of said lots 5, 6 or 7, or upon which it could use, on said south side of the river, any of said water so raised by said dam."

Quotation from answer on page 22 of record:

"And these defendants deny that either the plaintiff, the Fox and Wisconsin Improvement Company, or the State of Wisconsin ever had or owned any water, right to water, or water power (except for the purpose of navigation), upon or along said Fox river, except as riparian owners; and these defendants, upon information and belief, state that the state of Wisconsin never had authority under its constitution, to acquire by purchase, condemnation or otherwise, or to accept or receive title to any land

or water, or water power along or upon said Fox river, except for the purposes of navigation; and that it never had any right, power, or authority to take or condemn private property for the purpose of milling or manufacturing of any kind, or for the purpose of transfer or sale or lease thereof to others for any purpose other than navigation."

The Canal Company, having in its complaint based its alleged claim and title to the water power of the Fox river, and the alleged appropriation thereof by the State of Wisconsin to its own use and the use of its assigns and successors, upon section 16 of the act of 1848, and the plaintiffs in error having by their answer denied such appropriation, and also the alleged title and ownership of said water power by either the state, the Improvement Company or the Canal Company, the validity of said section 16 was thereby necessarily raised and drawn in question because there was no other foundation set up for said appropriation, title and ownership, than that given by said section 16.

It is true that the Canal Company claimed title to the water power in question on the trial by prescription, but the Supreme Court of the State has eliminated that question from consideration here by deciding that the claim of prescription was not well founded, or at least by declaring that it did not base its decision of the Canal Company's title upon any prescriptive right. We quote from the opinion of the State Supreme Court on page 92 of record:

"4. A prescriptive right to maintain the south half of the dam on lot 5, founded upon twenty years uninterrupted adverse user, is claimed on behalf of the plaintiff. Inasmuch as we are of the opinion that the United States has the legal right to maintain the dam on lot 5 without regard to any prescription, it is quite immaterial whether such claim is well founded or otherwise. *It probably is not well founded as to the additional embankment constructed from the old dam to the new dam: perhaps not as to the portion of the new dam on lot 5, which includes all of the structure south of the center of the stream.*"

The question of the validity of said section 16, was clearly and expressly raised and presented by the last quotation above made from the answer of the plaintiffs in error on page 22 of record. By that part of their answer, the plaintiffs in error denied that the

plaintiff, the Fox and Wisconsin Improvement Company, or the state, *ever had or owned any water, right to water, or water power (except for the purpose of navigation), upon or along said Fox river, except as riparian owners*, and they alleged:

1st. That the state never had authority under its constitution to acquire by purchase, condemnation or otherwise, or to accept or receive title to any land or water, or water power along or upon said Fox river, except for the purposes of navigation, and—

2d. That the state never had any right, power or authority to take or condemn private property for the purposes of milling or manufacturing of any kind, or for the purpose of transfer or sale or lease thereof to others for any purpose other than navigation.

If these denials and allegations were true, then section 16 must have been unconstitutional and void, because as already said, that is the act by and through which the state attempted to appropriate the water powers of the Fox river, and by and through which the Canal Company claims title to such water powers.

It is not necessary to allege in express terms that section 16 was unconstitutional and void and not due process of law, and therefore that the taking of property under it was repugnant to the constitution of the United States. If such questions were raised by clear and necessary intendment, it is sufficient to sustain the jurisdiction of this court.

> Wilson vs. Blackbird Creek Marsh Co., 2 Pete's1
> Bridge Proprietors vs. Hoboken Co. 1 Wall. 116–142.
> Chicago Life Insurance Co. vs. Needles, 113 U. S. 574–579.
> Murray vs. Charleston, 96 U. S. 432–441, 442.
> Furman vs. Nichol, 8 Wall. 44–56.

We have seen that the state and federal constitutions both alike declare in effect that no person shall be deprived of his property without due process of law; hence a statute repugnant to one in this respect, would be repugnant to both, so that the plaintiffs in error, by questioning the authority of the state under its constitution, to take and appropriate water power upon the Fox river by

virtue of section 16, also questioned such authority under the federal constitution.

Spencer vs. Merchant, 125 U. S. 345–352.

OPINION OF STATE SUPREME COURT.

It clearly appears from the opinion of the State Supreme Court, that the federal question contended for was raised and presented to that court, and decided against the federal right. After stating the facts, the opinion starts out by saying in substance that the controlling question in the case was, had the Water Power Company the right to cut the embankment on lots 5 and 6 on the south side of the river, and draw water from the pond made by the Kaukauna dam for hydraulic purposes, and then says:

> "The solution of this question requires the determination of several other questions, which will be stated and considered in their order."
>
> "*1. The claim of the plaintiff corporation to all the surplus water power created by the dam, is based upon the proposition that section 16 of the act of the legislature, approved August 8, 1848, appropriates all such water power to the state. This proposition is disputed on behalf of the defendants.*" (record, page 88.)

Then follows a construction of section 16, holding that it covered the water power in question.

We further quote from the opinion on page 89 of record:

> "We conclude, therefore, that whatever right the state took to the Kaukauna water power, by the act of 1848 (*which is the absolute ownership of the whole thereof if that is a valid act*), is vested in the plaintiff."

Allow us to say here in connection with this last quotation, that the court must have decided section 16, of the act of 1848, to be valid, because they held in subdivision 5 of the opinion (record, page 92), *that the plaintiff was the legal owner of the water power created by such dam (meaning the Kaukauna dam), over and above what is required for navigation.*

plaintiff, the Fox and Wisconsin Improvement Company, or the state, *ever had or owned any water, right to water, or water power (except for the purpose of navigation), upon or along said Fox river, except as riparian owners*, and they alleged:

1st. That the state never had authority under its constitution to acquire by purchase, condemnation or otherwise, or to accept or receive title to any land or water, or water power along or upon said Fox river, except for the purposes of navigation, and—

2d. That the state never had any right, power or authority to take or condemn private property for the purposes of milling or manufacturing of any kind, or for the purpose of transfer or sale, or lease thereof to others for any purpose other than navigation.

If these denials and allegations were true, then section 16 must have been unconstitutional and void, because as already said, that is the act by and through which the state attempted to appropriate the water powers of the Fox river, and by and through which the Canal Company claims title to such water powers.

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We quote further from the opinion on page 89 of record:

"2. It is further maintained on behalf of the defendants that conceding the Kaukauna water power is within the provision of section 16, of the act of 1848, such act is invalid as to the surplus of the water power over and above that required for the navigation of the river, *for the reason that it is taking private property for private use, which is beyond the power of the legislature.*"

This plainly states the first ground upon which it is claimed that section 16 was not due process of law, and that it was raised and presented.

The state Supreme Court held that the taking was incidentally for a public use, but that decision does not affect the jurisdiction of this court, as this court will give the statute an independant construction in determining whether or not, it is due process of law.

Yick Wo vs. Hopkins, 118 U. S. 356.

We again quote from the opinion on page 90 of record:

"*3. It is further claimed on behalf of the defendants that by locating the south end of the dam upon lot 5, building an embankment thereon, and on lots 6 and 7, and appropriating the whole water power created by the dam; the state took the property of the owners of those lots, and that the laws of the state made no adequate provision for compensating them therefor.*

Here is plainly stated the second ground upon which it is claimed that section 16 was not due process of law.

Although not essential to the question of jurisdiction, we cannot refrain from here calling the attention of the court to the fact that the act of Congress of March 3, 1875, pointed out by the State Supreme Court as the avenue through which the Water Power Company could get compensation for its water power, parcel of lot five, claimed to have been taken by the state under section 16, was repealed on the first day of February, 1888, (25 U. S. Statutes at Large, page 21,) and before the opinion of said State Supreme Court was announced and filed; said opinion having been filed

February 28, 1888. (Case in State Court, reported in 70 Wis. 635.) Such repeal at all events rendered the *confiscation* complete, even under the ruling of the State Supreme Court. If this case is ever argued on its merits, we venture the assertion that it will be made clearly to appear that the act of Congress of March 3, 1875, had no relation whatever to the water power in question.

We further quote from the opinion on page 93 of record:

> "The case is a very important one, and any judgment finally entered in it may, probably will, be far reaching in its effect upon water rights on the Fox river. The writer ventures to express the opinion that there are federal questions involved in it which will support an appeal to the Supreme Court of the United States, and the desire that such an appeal may be taken to the end that the relative right of the plaintiff and other claimants to water power created by the improvement of the Fox river, now owned by the United States, may be finally determined by that tribunal."

We give this quotation as confirming the fact that federal questions were involved and had been raised and presented, and not as stating what they were.

NECESSARILY INVOLVED.

It appears from the record herein that the validity of section 16 was necessarily involved in the decision of the State Supreme Court, and that it could not have given the judgment which it passed without deciding in favor of such validity. The Canal Company founded its right to the water power in question upon that act and no other, and it made no other claim of title except by prescription, which was decided against it.

Armstrong vs. Treasurer of Athens County, 16 Peters, 281–285.
Wilson vs. Blackbird Creek Marsh Co. 2 Peters, 245–250.
Chicago Life Insurance Co. vs. Needles, 113 U. S. 574–579.
Eureka Lake Co. vs. Uyba County, 116 U. S. 410.

FOURTEENTH AMENDMENT.

The counsel for defendant in error contends that because the state legislation drawn in question was enacted in 1848, therefore the fourteenth amendment to the constitution of the United States, adopted in 1868, is inapplicable. The fourteenth amendment prohibits any state, through *any* agency whatever, whether legislative, executive, or judicial, from depriving any person of property without due process of law. It does not define what is due process of law, but whatever is not, it prohibits.

Section 16 of the act of 1848 was an assertion by the state of the right to arbitrarily take and appropriate private property for a private use, or perhaps for a public use, but in either case without compensation; at least, such was and is the contention of the plaintiffs in error. The record shows that no part of the water power in question had ever been actually taken or appropriated by the state or its assigns prior to the commencement of this suit; therefore, section 16 as to such water power had remained a dead letter upon the statute book up to that time. The Canal Company found it necessary to invoke the authority of the state through the agency of its courts, to give effect to the statute of 1848, and this is the authority exercised through such agency to which the fourteenth amendment applies, and is also the authority drawn in question under the provisions of section 709 of the U. S. Revised Statutes, as well as the void statute enforced by such authority. If section 16 was void, and not due process of law according to the law of the land, then the judgment of the state court holding it valid and giving it effect, was also not due process of law, and was in violation of the fourteenth amendment.

In *Head vs. Amoskeag Manufacturing Co.*, 113 U. S. 9, the state statute drawn in question was approved July 3, 1868, twenty-five days prior to the adoption of the fourteenth amendment to the federal constitution.

Justice Gray, in delivering the opinion of the court in this case, says, at page 15:

> "The single question presented for decision is whether he (plaintiff in error) has been deprived of his property without due process of law in violation of the fourteenth amendment of the

constitution of the United States. It is only as bearing upon that question that this court, upon a writ of error to a state court, *has jurisdiction to consider whether the statute conforms to the constitution of the state.*"

Provident Institution vs. Jersey City, 113 U. S. 506, was a writ of error to the Court of Chancery, of the state of New Jersey, based upon an alleged violation of the *due process of law* clause of the fourteenth amendment. The state statute, there drawn in question, was passed May 25, 1852.

This court, in its opinion in *Strauder vs. West Virginia*, 100 U. S. 303, at page 310, uses the following language:

> "The fourteenth amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory, but every prohibition implies the existance of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, libertyor property. Any state action that denies this immunity to a colored man, is in conflict with the constitution."

In Virginia vs. Rives, 100 U. S. 313, at page 318, we find the following in the opinion of the court:

> "It is doubtless true that a state may act through different agencies, either by its legislative, its executive, or its judicial authorities, and the prohibitions of the amendment (referring to the fourteenth amendment), extend to all action of the state, denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the 5th section of the fourteenth amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive, or the judicial department of the state. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition by removing the case from a state court, in which it is denied, into a feuderal court, where it will be acknowledged. Of this there can be no reasonable doubt."

And in *Ex. Parte Virginia*, 100 U. S. 339, we quote the following from the opinion of the court, at page 347:

> "A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition, and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning."

Neal vs. Delaware, 103 U. S. 370.

ALFRED L. CARY,
For Plaintiffs in Error

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 65.

The Kaukauna Water-Power Company, Bradner Smith & Company, James C. Delaney, Charles D. Cassed, David McCartney, James H. Elmore, Joseph Klein, The Milwaukee, Lake Shore & Western Railway Company, The Badger Paper Company, and B. Aymar Sands, Trustees,

PLAINTIFFS IN ERROR,

vs.

The Green Bay and Mississippi Canal Company,

DEFENDANT IN ERROR.

In Error to the Circuit Court of Outagamie County, Wisconsin.

PETITION FOR REHEARING.

ALFRED L. CARY,
DAVID S. ORDWAY,
Counsel for Plaintiffs in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1891.

THE KAUKAUNA WATER-POWER COMPANY, BRADNER SMITH & COMPANY, JAMES C. DELANEY, CHARLES D. CASSED, DAVID McCARTNEY, JAMES H. ELMORE, JOSEPH KLEIN, THE MILWAUKEE, LAKE SHORE AND WESTERN RAILWAY COMPANY, THE BADGER PAPER COMPANY, AND B. AYMAR SANDS, TRUSTEE, *Plaintiffs in Error,* *v.* THE GREEN BAY & MISSISSIPPI CANAL COMPANY, *Defendant in Error.*	*No.* 65.

In Error to the Circuit Court of Outagamie County, Wisconsin.

PETITION FOR REHEARING.

To the Honorable the Supreme Court of the United States:

And now come the said plaintiffs in error by Alfred L. Cary and David S. Ordway, their counsel, and respectfully

petition this honorable Court for a rehearing herein upon the following grounds, viz:

I.

Where private property is taken for public use under the authority of the United States, or of the State of Wisconsin, *the title does not pass from the owner without his consent until just compensation has been made to him.* Each of these sovereign powers has the same constitutional limitation in this respect, viz., that private property shall not be taken for public use without just compensation.

Kennedy v. *Indianapolis*, 103 U. S. 599.

Cherokee Nation v. *Kansas R'y Co.*, 135 U. S. 641–660.

II.

The right to obtain compensation must exist, after the remedy is provided, for the same length of time that it would take to acquire title by prescription or limitation, unless a shorter period is prescribed by statute. In Wisconsin this is twenty years (Wisconsin Revised Statutes, 1878, section 4215).

Why should the owner of real property taken for public use be barred of his right to compensation therefor, after he can lawfully institute proceedings to obtain it, by any shorter period than he would be barred of his title to such property by prescription or limitation, unless the statute giving the remedy for the compensation prescribes a shorter period for its exercise?

III.

The act of Congress of March 3, 1875, was the first which provided a lawful remedy and means for obtaining

compensation for private property taken for the purposes of the improvement of the navigation of the Fox river. This was conceded by the Supreme Court of Wisconsin and also by this Honorable Court, as we read and understand its opinion herein. Such act was *silent* as to the time within which the remedy given by it should be exercised; therefore as to all property coming within its provisions and taken before the approval of the act (if our second proposition is correct), twenty years from the date of its approval would be the limit for exercising the remedy to obtain compensation, and as to all property taken subsequent to the approval of the act, the limitation for exercising the remedy would be twenty years from the date of the taking. Such being the case, the owner of lot five would not waive its right to compensation, *by the lapse of time*, for such portion of said lot and the water-power parcel thereof as was taken for the public use prior to the approval of said act, under the period of twenty years from March 3, 1875, the date of such approval, and as to all that part of said lot taken for the purposes of the improvement after the approval of such act, such waiver would only be from the lapse of twenty years from the date of such taking.

IV.

At the date that defendant in error sold and conveyed the improvement to the United States, to wit, September 18, 1872, no compensation had been made for that portion of lot five which had then been taken and no valid remedy for obtaining such compensation then or ever had existed, so that at that time and under such circumstances the owner of said lot had not and cannot be said to have waived his right to compensation by the lapse of time or by acquiescence, as there could be no acquiescence when

no lawful means for obtaining compensation existed. Under these circumstances and under the two decisions of this Court above cited, no title to any portion of said lot five had passed to the defendant in error at the time of such sale.

V.

In 1875–6, the United States constructed a new dam forty feet below the old one on lot five and abandoned the old dam. This was after the approval of the act of Congress of March 3, 1875, and was a new and independent taking by the United States under the provisions of that act. No compensation has ever been made to the owner of lot five for such taking, and we respectfully submit, for reasons above stated, that such compensation has not been waived, and therefore, under the rule laid down in the two cases above cited, no title to the property so taken has passed to the United States.

VI.

Periods of limitation once established for the exercise of a remedy cannot be shortened without a fair warning, by the giving of a reasonable time within which to exercise the remedy before it shall be cut off by the shorter period. (*Koshkonong* v. *Burton*, 104 *U. S.* 668.) The act of Congress of March 3, 1875, was repealed February 1, 1888 (25 U. S. Statutes-at-large, page 21), without notice and without giving any time for the future exercise of the remedy which had existed thereunder. This was a cutting off of the right to obtain compensation without notice. For this act in thus summarily depriving the owner of his remedy to obtain compensation the Government should be held to have relinquished and abandoned

all right and title to the property which it had taken for the public use. No other ruling it seems to us will answer the requirements of the constitutional provision that private property shall not be taken for public use without just compensation.

VII.

For the purpose of showing the importance of this case and the large and varied interests affected thereby, we beg leave to state that in a suit now pending in the Circuit Court for Outagamie county, Wisconsin, wherein all the parties to this writ of error, as well as others, are parties, for a partition and apportionment of the water of the Fox river to different channels therein caused by islands in said river just below the dam in question, the defendant in error, by counter-claim, in the nature of a cross-bill, asserts the right to divert all of the water of said river sustained by said dam to the Government canal on the north side of said river and carry the same through and along the first level of said canal, a distance of about 1000 feet, and use the surplus thereof, not required for navigation, upon and along said level of said canal for hydraulic purposes, and it claims and asserts such right under the judgment of the State court rendered herein.

The plaintiffs in error dispute said assertion of right under said judgment to so divert said water, but should it be sustained, the taking of the United States, by virtue of the dam upon lot five, would not only relate to that portion of said lot taken at and above the dam, but to all of the water rights of the Water-Power Company, plaintiff in error, in the river on the south side thereof for a long distance immediately below the dam, which are very valuable. On the other hand, if such asserted right of the defendant in error to so divert the water of said river

is not sustained, and said water must flow over said dam and come to the land of the plaintiff in error below the dam, the defendant in error would not be seriously damaged by an adverse decision to its alleged title to water-power herein for the reason that property in water consists only in its use and not in the water itself (Gould on Waters, section 204), and as the defendant in error has no property upon the south side or south half of said river, it cannot make any profitable use of such water or have any great property rights therein.

Further, several large industries have been established upon the hydraulic canal of the plaintiff in error, and have used, and are now using, the power supplied by such canal. This fact is fairly inferrable from the record, which shows that all of the plaintiffs in error, except Water Power Company and Sands, are lessees of water-power from that company. (Rec. p. 6.) A large community has grown up in the vicinity of this canal, and many persons are employed in the industries supplied with power therefrom. If the judgment of the State court herein remains in force, the canal of the plaintiff in error will be closed, and such industries will thereby be deprived of their power.

VIII.

We respectfully submit that the act of the Water-Power Company in cutting through the embankment and drawing the water from the pond, which it claimed as its own for the use of its canal, is clearly distinguishable from that of the land-owners in the two Iowa cases cited in the opinion of this Honorable Court, viz., State *v.* Hessenkamp (17 Iowa, 25) and Dunlap *v.* Pulley (28 Iowa, 469). In the Iowa cases the land-owners sought to repossess themselves of property which had theretofore been

in the *actual* possession and enjoyment of the State under the power of eminent domain for a long time, while in the case at bar the Water-Power Company only sought to reduce to its possession and use the water which had never been actually possessed or used by the defendant in error, but had run to waste. In the Iowa cases the retaking by the land-owners was a direct interference with the *public use*, while in this case the alleged retaking in no way interfered with that use. The mere cutting of the embankment would hardly bring this case under the rule laid down in the Iowa cases, as that is controlled by the United States, which makes no complaint.

In submitting for the first time a petition of this nature to this Honorable Court, we do so with the utmost respect, and in compliance with rule 30, we fully certify our belief that the grounds assigned therefor are meritorious and well founded in law.

Respectfully submitted.

ALFRED L. CARY,
DAVID S. ORDWAY,
Counsel for Plaintiffs in Error.

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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 65.

KAUKAUNA WATER POWER COMPANY, ET ALS.,
PLAINTIFFS IN ERROR,

vs.

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BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

1

BRIEF STATEMENT.

This contention is over title to water power furnished by a dam across the Fox, a great public river in Wisconsin, built primarily to furnish slack water navigation.

The Fox was, by nature, a navigable stream broken by rapids, around which were carrying places. It has been navigated since the discovery of the country. As early as 1829, the legislature commenced providing for the improvement of its navigation (1).

It is one of those rivers declared "common highways and forever free," in the ordinance of 1787, the constitution of Wisconsin, and Wisconsin statutes (2). (Transcript, p. 45.) 2

NOTE 1—Act of Territory of Michigan, approved Oct. 23, 1829.

"	"	"	"	March 7, 1834.
"	"	"	"	Jan. 26, 1835.
"	"	Wisconsin	"	Dec. 3, 1836.
"	"	"	"	Jan. 11, 1838.
"	"	"	"	June 20, 1838.
"	"	"	"	Jan. 13, 1840.

NOTE 2—Ordinance of 1787, Article IV, last clause.
Constitution of Wisconsin, Article IX.
Rev. Stat. Wis., 1858, Ch. 51 Sec. 1. 3

In 1846 the United States granted to Wisconsin certain public lands, in trust, for the purpose of improving the navigation of the Fox and Wisconsin rivers.(3) This grant was accepted by Wisconsin in 1848. (4) In the same year, in execution of this trust, Wisconsin organized a Board of Public Works, and provided for sale of the lands so granted and the construction of dams and canals. (5). By section sixteen of that act, it is declared that "whenever a water power shall be created by reason of any dam erected, or other improvements made, on any of said rivers, such water power shall belong to the State, subject to future action of the legislature."

This Board of Public Works entered on the work of improv-
4 ing the navigation of the Fox and Wisconsin rivers; and, as part of such improvement, it located and planned this dam and others. This Board, by express authority of the state, converted such of the water powers created by the dams located by it, as it could so convert, into funds to aid in the execution of the trust.(6)

In 1853, Wisconsin, finding itself embarrassed in execution of this trust, by accumulated demands and unexecuted contracts which it was unable to fulfill on its part, (Record, p. 46,) chartered the Fox and Wisconsin Improvement Company, and granted to it the works of improvement, including all this trust fund, "rights of way, dams, locks, canals, water power, and other appurtenances of said works, * * * and all
5 privileges of constructing said works * * to the same extent and in the same manner, that the state now holds, or may exercise such rights."(7) In consideration of this grant, the Fox

NOTE 3—Chapt. 170, Acts Cong. 1846.
NOTE 4—Resolutions of Const. Conv. Wisc. Feb. 1, 1848.
Act Wis. Leg. approved June 29, 1848.
NOTE 5—Act Wis. Leg. approved Aug. 8, 1848.
NOTE 6—Ch. 277 Laws Wis. 1850.
Ch. 283 Laws Wis. 1850.
Transcript, pp. 59, 56.
NOTE 7—Transcript, pp. 46, 57, 58.
6 Ch. 98, Laws Wis. 1853.

and Wisconsin Improvement Company paid the demands incurred by the Board of Public Works, (except a small amount paid by defendant in error,) and procured the discharge of the unexecuted contracts. (Transcript, 46.) The trust lands were
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feet below the upper line thereof (9). Lot 5 was then t
of Samuel Beardsley, having been entered in 1833 an
without reservation, by the United States to one Hathaway in 7
1837. (Transcript, 78, 79.) It has since become the property of
plaintiffs in error. (Transcript, 64.) It bought of one Hunt, then
owner of lots 6 and 7, the right to maintain the dam or embankment
across those lots. (Transcript, 20.) The Improvement Company
then owned the north shore, including land enough to use all the
water of the river. (Transcript, 46, 50, 67.)

Additional obligations respecting the character of this improvement were from time to time imposed by the State of Wisconsin upon this company and its successor, the defendant in error(10). In 1864, this company having failed to complete the improvement, as required by the state, a trust deed made by this company to secure such completion was foreclosed, and on such foreclosure the defendant in error bought and procured a deed of the works of improvement, including "all water powers created by and upon the line of 8

NOTE 8—Sec. 4, Ch. 98, Laws Wis. 1853.

NOTE 9—Transcript pp. 45, 46.
Map at page 82 of Transcript.
Other maps in the record.

NOTE 10—Chapter 64 Laws Wis. 1855.
Chapt. 112, Laws Wis. 1856.
Chapt. 572, Laws Wis. 1866.

9

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or connected with the works of the Fox & Wisconsin Improvement at whatever points located, and wherever situated, estimated to be upon the lower Fox about 28780 horse power." As part of the consideration of this purchase, defendant in error paid the remaining unpaid indebtedness incurred by the Board of Public Works on account of this improvement, (11) and completed the improvement according to the latest requirement of the State.

In 1870, the United States, wishing to possess and control this improvement, authorized the Secretary of War to ascertain "the sum which in justice ought to be paid to the Green Bay and Mississippi Canal Company, * * for the transfer of all and singular its property and rights of property in and to the line of
10 water communication * * including its locks, dams, canals, and franchises, or so much of the same as shall, in the judgment of said secretary be needed," and to enter into arbitration to fix the price(12). Such arbitration was had; and the arbitrators held that "The true question to determine is, What is the value of the improvement to the government when taken for the purpose of making the same a part of a through route from Lake Michigan to the Mississippi River? * * and therefore, it would seem to be worth as much as it would cost to build such works at the present time, deducting a reasonable sum for depreciation by wear and decay." The arbitrators then determined the value of
11 the works, after allowing for depreciation, "to be $1,048,070." From this they deducted the proceeds of the trust lands, $723,070; "leaving a balance of $325,000 to be paid to the Green Bay and Mississippi Canal Company; and whereas, under the said act, the Secretary of War may, in his judgment, decide that such personal property may not be needed, and that a part of the franchises of the Canal Company, viz., the water power created by the dams and by the use of the surplus waters not required for purposes of navigation, are not needed, and, in order to enable

NOTE 11—Transcript 47, 58, 59.

12 NOTE 12—Laws Cong. 1870, Ch. 210.

said secretary to pass judgment upon those questions," the board estimated and appraised "the value of such water powers, and lots necessary to the enjoyment of the same, * at the sum of $140,000, which said sum is to be deducted from the said sum of $325,000 in case the said Secretary, or Congress, shall determine that the said water-powers are not needed for public use." They also valued certain personal property, which might be deemed not needed at $40,000([13]). The Secretary of War and Congress both held that such water-powers and such personal property were not needed. The United States, therefore, took the property, excepting this personal property and these water-powers ([14]) and paid for them $325,000 less $180,000; that is $145,000. The water-powers so estimated to be worth $140,000, which $140,000 was deducted from the purchase price of our property, included the water-power in question. This water-power, in all, (one-half of which is in contention here,) amounts to 2500 to 2700 horse power. In 1872 the United States paid the $145,000 and took a conveyance of this improvement from defendant in error "saving and excepting therefrom and reserving * * the water-powers created by the dams and by the use of the surplus water not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto." (Transcript, pp. 23 to 26.)

13

There is no direct proof that any owner of lot 5 ever conveyed any right to maintain this dam. Nor is there any direct proof that any interest in it was condemned. But this dam and embankment on lot 5, commenced in 1853 and completed in 1855, was continuously maintained (being repaired from year to year) by the State, the Fox and Wisconsin Improvement Company and

14

NOTE 13—Report Secy. War, to Cong., March 8, 1872.
House Doc., 42nd Cong., second session Ex. Doc. 185, pp. 6, 12.
Transcript p. 72.

NOTE 14—Act Cong. 10 Jan. 72, Ch. 416.

15

defendant in error, until 1872, and therefrom by the United States until the embankment was broken by plaintiff in error in 1885, (Transcript, pp. 47 to 54,) except that in 1876 the United States, instead of repairing the old dam, built a new one of same height, about forty feet, at south end, below the old one, and carried the embankment down from the south end of the old dam to the south end of the new one. There is no proof of any complaint against the maintaining of this dam, or of any claim to water power adverse to claim of defendant in error until 1880. Then plaintiff in error commenced works showing that it would claim part of this water power, and defendant in error immediately gave notice that it would resist such claim. (Transcript, pp.
16 11, 12.) Plaintiff in error first broke the banks of this pond in 1885. (Transcript, p. 12.) The plaintiff in error is the owner of the river front of lots 5, 6 and 7, section 22, township 21, range 18, subject to the Hunt deed. The length of lots 6 and 7 on the river is ten to twelve hundred feet. The length of lot 5 on the river above the old dam is about 350 feet, and above the new dam, about 40 feet more. (Map in Transcript, p. 82.) This dam causes a flowage up the river of about two miles. (Transcript, pp. 47 to 64.)

In Supreme Court of Wisconsin, defendant in error pressed its claim to all the water power furnished by this dam on four
17 grounds:

First—It has grant of same from the State of Wisconsin, and substantially also from the United States.

Second—It and its grantors built, and for thirty years have maintained, the dam, paying for flowage and subjecting themselves to all damages for flowage; and they alone had the franchise to build and maintain the dam.

Third—It and its grantors have acquired, by limitation, the right to maintain the dam and embankment on south side. From the character and duration of their possession a grant is presumed
18 from owner of lot five.

Fourth—Riparian owner's right has been appropriated under act organizing Board of Public Works, and condemnation, if necessary, has been waived.

The claim on third ground has not yet been adjudicated upon. It involves no federal question. Hence, if this judgment is reversed on account of error in decision of any federal question involved in the first, second and fourth grounds, the case should be remanded for further proceedings in accordance with the opinion of this court.

FACTS RELATIVE ONLY TO MOTION TO DISMISS.

The only reference in the answer to any constitutional limitation is the following :

"And these defendants deny that either the plaintiff, the Fox and Wisconsin Improvement Company, or the State of Wisconsin, ever had or owned any water, right to water, or water power, (except for purpose of navigation), upon or along said Fox river, except as riparian owners. And these defendants upon information and belief, state that the State of Wisconsin never had authority, under its constitution, to acquire by purchase, condemnation or otherwise, or to accept or receive title to any land or water or water power, along or upon said Fox river, except for the purpose of navigation, and that it never had any right, power or authority to take or condemn private property for the purpose of milling, or manufacturing of any kind, or for the purpose of transfer, or sale, or lease thereof to others, for any purpose other than navigation." (Transcript, p. 22.)

On the trial in the Circuit Court plaintiff in error requested the judge to make twenty findings. (Transcript, pp. 37-45.)

They also requested the judge to adopt the following conclusions: "I find as conclusions of law, that the plaintiff is not entitled to any relief herein. Judgment is therefore ordered dismissing plaintiff's complaint upon the merits, with costs." (Transcript, p. 42.)

Defendant in error also proposed findings, (transcript, pp. 31-36.) Instead of adopting findings proposed by plaintiffs in error, or those proposed by defendant in error, the judge himself drew such findings as he approved. (Transcript, pp. 45-48.) Plaintiffs in error filed no exception thereto, nor any exception on account of the judge's failure to make other or further findings.

ARGUMENT ON MOTION TO DISMISS.

No Federal Question "Raised" and "Presented."

(*a*) An examination of the Answer and Bill of Exceptions will show no reference to any federal question, though the statutory provision which the plaintiffs invoked, is set out in the com-
22 plaint in full.

(*b*) Sec. 2863 R. S. Wis., 1878, provides, that "upon a trial of a question of fact by the Court, its decision shall be given in writing, and filed with the clerk within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly, as of the term at which the case was tried, and the judge shall state in his decision separately:

1. The facts found by him; and
2. His conclusions of law thereon."

Counsel for each party is entitled to, and in important cases ordinarily does, draw and submit to the judges, a statement of such facts and conclusions of law as he thinks the judge should
23 find. Then, if the judge declines to find as requested, his duty is to file exceptions to the refusal. He is thus able to review on appeal or writ of error, the decision of the judge upon the questions thus presented for his decision (15).

Note 15—Waite's Pr., Vol. 3, pp. 328-9 (ed. of 1874.)
Tomlinson vs. Mayer, 44 N. Y., 601, 607.
Ashley vs. Marshall, 29 N. Y., 494, 501.
Mayers vs. Amidon, 45 N. Y., 169.
Van Slyke vs. Hyatt, 46 N. Y., 259, 263.
24 Lefler vs. Field, 47 N. Y., 407.

This statement of facts, and the conclusions of law, upon which the court rests its judgment, with the exceptions to the conclusions found and not found, takes same place in the record as the verdict of a jury, and the instructions given and refused.

The instructions asked by either party show the position of that party upon the law. So the request of the party for findings and conclusions shows his position, and the points he relies on, in an equity case under the code ([16]).

In Barry vs. Schmidt (p. 176), Judge Orton says: "But the finding is silent as to any such issue of fact, and there was no request on the part of the defendant that the court should find on such issue, and there was no objection made or exception taken at the time, to the failure or omission so to find, and therefore 25
such deficiency of the findings was waived."

In Wrigglesworthy vs. Same, Judge Taylor said, (p. 257:) "If the defendant desired that there should have been any particular finding of fact, he should have called the attention of the court to the matter of fact upon which he desired a separate finding, and when the Court found upon the facts so pointed out, should have taken an exception, if the finding was not satisfactory."

The same reasoning applies to conclusions of law. Plaintiffs in error asked only one conclusion of law, to-wit, "that the plaintiff is not entitled to any relief herein." (Transcript, p. 42.)

26

In this case, counsel for each party made and filed a draft of the findings and conclusions, which he thought the judge should make and sign. In them he embodied the points on which he then, at the conclusion of the trial, rested his case. The draft of the findings and conclusions of the plaintiff in error, his final act before judgment, is part of the record.

Section 709 of United States Statutes, gives this court juris-

NOTE 16—Mead vs. Supervisors, 41 Wis., 205, 208.
Wrigglesworthy vs. Wrigglesworthy, 45 Wis., 255, 257.
Barry vs. Schmidt, 57 Wis., 172, 176.

27

diction to review the judgment of a State Court of last resort. First, "Where is drawn in question the validity of a treaty * *" Second, "where is drawn in question the validity of a statute of * * any State, on the ground of their being repugnant to the Constitution * * of the United States." Third, "when any title, right, privilege, or immunity is claimed under the Constitution * of * the United States." * *

It appears to us that plaintiffs in error seek, by assignment of error to bring this case within the jurisdiction of this court upon the second and third clauses of Section 709. Under the second, by errors third, eighth, ninth and tenth; and under the third, by errors fourth, fifth and seventh.

28 The jurisdiction of this court does not attach under the second clause, which alone is recited in the writ of error, (Transcript, p. 105,) because the record bears no sign that any federal question was "raised and presented" to the state court. The question must have been "raised and presented" in the trial court of the state in order to give this court jurisdiction under this second clause (17).

"Drawn in question," as used in this statute, means, not "might have been raised," but, "actually raised and presented and necessarily decided."

In Murdock vs. Hopkins this statute was fully considered and
29 interpreted. On page 635, 6, Justice Miller states this rule as

NOTE 17—Murdock vs. Hopkins, 20 Wall. 590, 635, 6.
Parmalee vs. Lawrence, 11 Wall. 36, 38, 9.
Stevens vs. Franklin Co., 14 Wall. 15, 19, 20, 1, 2.
Farney vs. Towle, 1 Black, 350.
Limmerman vs. Nebraska, 116 U. S. 54.
Messenger vs. Mason, 10 Wall. 507.
Santa Cruz Co. vs. Santa Cruz R. R., 111 U. S., 361, 2.
Broom Co. vs. Broom Co., 110 U. S. 57, 8, 9
Walker vs. Sauvient, 92 U. S. 90, 93.
Choetan vs. Gibson, 111 U. S. 200-1.

30

the conclusion of the court—"We hold * * that it is essential to the jurisdiction of this court over the judgment of a state court, that it shall appear that one of the questions mentioned in the act must have been raised and presented to the State Court."

In Parmalee vs. Lawrence, Justice Nelson says (p. 38, 9): "The conflict of the state law with the Constitution of the United States * * must appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or upon the exceptions taken to the ruling of the court."

Spencer vs. Merchant, ([18]) is not to contrary. Therein the plea presented the specific point of want of due process of law. Herein is no suggestion of want of due process of law, which is 31
the point now relied on.

Neither does the jurisdiction attach under the third clause of section 709, because no "title, right, or privilege or immunity," is specially set up or claimed" ([19]).

So far we have reviewed the record in that court—Complaint, Answer, Exceptions and Request for Findings—and we find no evidence of the raising or presentation of any federal question.

It cannot be said that it is not the province of a pleading to raise constitutional questions. The complaint sets forth the only legislation of the State which is involved. (Transcript, p. 2.) The answer invokes the Constitution of Wisconsin, but not of the 32
United States. (Transcript, pp. 15, 16 and 22.) It makes no suggestion of want of due process of law. If the answer had

NOTE 18—125 U. S., 345.

NOTE 19—Spies vs. Ills., 123 U. S., 131, 181.
Baldwin vs. Kansas, 129 U. S., 52, 56-7.
Chappell vs. Bradshaw, 128 U. S., 132-3-4.
R'y Co. vs. Guthard, 114 U. S., 133-137.
Santa Cruz Co. vs. Santa Cruz R. R. Co., 111 U. S. 361.
Brown vs. Colorado, 106 U. S., 95-97.
Clark vs. Pa., 128 U. S., 395-7.

33

involved that provision of the State Constitution relating to due process of law, Spencer vs. Merchant might be applicable. The provisions referred to raise entirely different constitutional questions, which are not federal.

The Supreme Court of Wisconsin acted in this case simply as a court of review. Therefore the plaintiffs in error could not give this court jurisdiction by raising or presenting a federal question in that court ([20]).

Here read paragraph from p-14

No federal question was raised in that court. If the counsel for plaintiffs in error will submit to this court all the five briefs filed on its behalf in the Supreme Court of Wisconsin, there will not be found in any one of them a hint that they rely upon any
34 provision of the Constitution of the United States, or in any way, upon want of due process of law.

No Federal Question Involved.

The attorney of plaintiff in error says, "The federal question claimed is, that plaintiffs in error have been deprived of their property, without due process of law, by the state of Wisconsin, through the agency of its Supreme Court in giving effect to, and enforcing a void statute of the state, in contravention of the fourteenth amendment to the constitution of the United States."

True, the court did hold that the water power in question
35 was one of those referred to in Section 16, of act approved August 8, 1848, Laws of Wisconsin. It also held that the owner of the south shore, having permitted the State to enter on his land and build the dam in question, in 1855, under the statute of Wisconsin of 1848, and having permitted the State and its grantees

Note 20—Spies vs. Ills., 123 U. S., 131, 181, 182.
Baldwin vs. Kansas, 129 U. S , 52, 57.
Brooks vs. Mo., 124 U. S., 394-5.
Stevens vs. Franklin Co , 14 Wall., 15, 19, 22.
Parmalee vs. Lawrence, 11 Wall., 36-8-9.
Ins. Co. vs. Treasurer, 11 Wall , 208.

36

to keep the dam on this land, and repair and maintain the same for over twenty years, and having permitted the United States to rebuild the same a little lower down stream in 1876, all without objection, and the United States having made provision for the assessment of all damages for taking property for this improvement,—the riparian owners could not now, in 1880, assert title to the hydraulic power furnished by the dam.

The court did not determine upon the validity of the State law, or upon any right asserted under it. It determined that the riparian owner, having acquiesced in the action of the State and its grantees under same, for twenty-five years, and having permitted the State and its grantees, and the United States, to act under the statute, and build and maintain dams under it, could 37
not now retake, in its vastly improved condition, the property taken under authority of statute:—that it could not take its property, and the trust property of the State, intermixed with it, by the tacit consent of the riparian owner, especially while there was a valid legal provision for assessment and payment of damages.

This proposition is denied in one of the briefs for plaintiff in error ([21]). I rest its determination on the last clause of the opinion found on page 91 of the Transcript, and the first clause found on page 92, interpreted in the light of the undisputed facts.

This contention does not relate to the landing of the dam on 38
lot 5, nor the building of an embankment on same. Plaintiff in error still acquiesces in that taking of its property, and seeks to take advantage of that taking, by using the power created by the dam. Mr. Ordway says: "There is not a *fact* stated in the complaint tending to support a claim under the statute of limitations. The *entry* pleaded *was not adverse*, it was by *consent* of the public, in which was the paramount right, the act of 1848 gave that right. All owners of lands lying under the water of navigable

NOTE 21—Mr. Ordway's Brief on Motion to Dismiss, p. 20. 39

streams (not lakes) in the State of Wisconsin, hold the same subject to this paramount right of the public" ([22]).

Read on Page 12

No advantage can be taken of any expressions in any of proceedings of plaintiffs in error, if any such are to be found, as speak generally of constitutionality. In such cases, if any there are, reference is made to the State Constitution, which was invoked by the answer.

FIFTH AMENDMENT.

The fifth amendment to the United States Constitution, restricts the power of the United States, and not that of the States ([23]). The question: Has there been a violation of the provisions of the State Constitution relative to taking of private property? is not federal.

FOURTEENTH AMENDMENT.

Reference is now for the first time made to the fourteenth amendment to Constitution of United States. The State legislation construed by the Supreme Court of Wisconsin, was enacted in 1848. The fourteenth amendment was adopted in 1868.

If the property was taken by the decision, then, plainly, it was taken by "due process of law" ([24]).

NOTE 22—Mr. Ordway's Brief on Motion to Dismiss, p. 21.

NOTE 23—Barron vs. Baltimore, 7 Pet., 243, 247.
Holmes vs. Jennison, 14 Pet., 540, 587.
Withers vs. Buckley, 20 How., 84, 88, 89.
Twitchell vs. Com'lth, 7 Wall., 321, 5, 6.
Davidson vs. New Orleans, 96 U. S., 97, 101.
Munn vs. Illinois, 94 U. S., 113, 124.
Slaughter House Cases, 16 Wall., 36, 76, 80.

NOTE 24—Kennard vs. Morgan, 92 U. S., 480, 481.
Hagar vs Reclamation Dist., 111 U. S., 701.
Davidson vs. New Orleans. 96 U. S., 97.
Walker vs. Sauvinet, 92 U. S., 90-93.
Miller on Constitution, p. 664.

In Davidson vs. New Orleans, Justice Miller says, on p. 99: "Although counsel for the plaintiff in error concede, in the first sentence of their brief, that the only federal question is, whether the judgment is not in violation of that provision of the Constitution which declares that 'no State shall deprive any person of life, liberty, or property without due process of law,' the argument seems to suppose that this court can correct any other error which may be found in the record."

On p. 104: "It would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." 43

On p. 105: "It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States. * * But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." 44

In Kennard vs. Morgan, Chief Justice Waite says: "Our authority does not extend beyond an examination of the power of the courts below to proceed at all." 45

If it was taken by the act of 1848, then it was taken by legislation over which this court has no supervision. If it was taken by act of Congress then the decision was in favor of, and not against, a claim based on a federal statute.

Federal constitutional limitations on State power have no retroactive effect ([25]). No law has a retroactive effect unless the intention that it shall have is clearly expressed ([26]). This rule applies to construction of constitutional law as well as statutory law ([27]).

Whether or not the act of the State is consistent with the State Constitution, relative to taking of private property without due compensation, is the only constitutional question raised
46

NOTE 25—Owings vs. Speed, 5 Wheat., 420.
Approved in Scott vs. Jones, 5 How., 343, 377; also by
Sedgwick, State and Const. law, P. 618.
Cooper vs. Telfair, 4 Dall, 14, 19.
Sedgwick, State, and Const. Law, 160, 161.

NOTE 26—Amsbury vs. Hinds, 48 N. Y., 57, 60.
Price vs. Mott, 52 Pa. St., 315, 316.
Abington vs. Doxbury, 105 Mass., 287, 292.
State vs. Roosa, 11 Ohio St., 16.
Torry vs. Corless, 33 Me., 333, 336.
Nillair vs. Balto., 45 Md., 546, 555.
47
Finney vs. Ackerman, 21 Wis., 268, 270.
City vs. Hill, 39 N. J. L., 555, 558.
Collins vs. Ry., 9 Heisk., 841, 847.

NOTE 27—Indiana Co. vs. Agricul. Soc., 85 Pa. St., 357, 360.
Lehigh Iron Co., 81 Pa. St., 481-5.
Douglas vs. Harrisville, 9 W. Va., 162, 165-6.
Brown vs. The State, 23 Md., 503, 511.
State vs. Macon Co., 41 Mo., 453, 463.
Slack vs. Railroad, 13 B., Mon., 1, 17.
Cass vs. Dillon, 2 Ohio St., 607, 611, 612.
State vs. Trustees, 8 Ohio, 394, 398, 9.
48

by the pleadings or pressed in State court by plaintiff in error. That question is not within jurisdiction of this court ([28]).

THE MERITS.

It seems that, if this court has jurisdiction, it is simply to determine if private property has been taken without due process of law; that is, without giving the owner his "day in court." It does not avail to say that, having had the day in court, an incorrect decision has been given ([29]).

No Property Taken.

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It seems to me that it does not appear that any property of plaintiff in error has been taken. The matter of the landing of the dam and building an embankment on its land is not involved in this contention. As to that taking, at least, plaintiff in error acquiesced. It even insists that the dam is rightfully maintained ([30]) Herein it seeks to avail itself of the dam and embankment The contention is over the power furnished by the fall of the water from the level of the pond held by the dam to the level of the river below. Has plaintiff in error any property in this which is taken?

Note 28—Jackson vs. Lamphire, 2 Pet., 280. 50
Withers vs. Buckley, 20 How., 84.
Medbury vs. Ohio, 24 How., 413.
Porter vs. Foley, 24 How., 415.
Salmons vs. Graham, 15 Wall., 208.
Davidson vs. New Orleans, 96 U. S., 97.
Barbier vs. Connolly, 113 U. S., 27, 30.
Baldwin vs. Kansas, 129 U. S., 52, 57.
Walker vs. Sauvinet, 92 U. S., 90, 92, 93.

Note 29—Kennard vs. Morgan, 92 U. S., 480.
Lent vs. Tillson, 140 U. S., 316, 328-9.

Note 30—Mr. Ordway's Brief, p. 41. 51

RIPARIAN RIGHT IN PUBLIC RIVER.

First—Has a riparian owner property in the fall of the water of public navigable streams, as against the State?

This was a public navigable river: an inter-state highway. No dam could be built on it without legislative grant.(31) The State had undoubted authority to improve it for purposes of navigation pursuant to act of Congress. It did improve it for navigation under claim of right An incident to such improvement was the creation of this water-power. The State alone had had authority to bring it into existence. (31) The State brought it into existence by building the dam. The State declared that such
52 power should be its own. Whose, then, was it? Chief Justice Ryan, in Attorney-General vs. Eau Claire, (32) said "And

NOTE 31—Penn. vs. W. & B. Bridge Co , 54 U. S. 518.
Pound vs. Turck, 95 U. S. 459.
Pumpelly vs. Canal Co., 80 U. S., 166.
United States vs. Beef Slough Co., 8 Biss., 421.
Herrman vs. Beef Slough Co., 8 Biss., 334.
Woodman vs. Manufacturing Co., 1 Biss., 546.
Sweeney vs. R. R. Co., 60 Wis., 60.
Barnes vs. Racine, 4 Wis , 454.
Smith vs. Ford, 48 Wis , 115, 164.
53 Lawson vs. Mowry, 52 Wis., 219, 237.
Attorney General vs. Eau Claire, 37 Wis., 400, 435.
Enos vs. Hamilton, 24 Wis., 658.
Impt. Co. vs. Lyons, 30 Wis., 61.
Boom Co. vs. Reiley, 46 Wis., 243.

This is a common law attribute of sovereignty. It does not rest, as counsel seem to suppose, on the Wisconsin Statutes. They only furnish a rule by which navigability of certain streams is fixed.

Note 32—Att'y Gen vs. Eau Claire, 37 Wis., 400, 435.
54

that is so essentially a public and municipal purpose, that it is obvious that the city can take any legitimate power in aid of it. For that purpose the legislature could unquestionably grant, and the city take, power to construct and maintain a dam, not obstructing the navigation of a public river, or violating other right, public or private. And the dam so authorized might well produce an excess of power. *Superflua non nocent.* In such case, as was frankly admitted on the argument, the surplus water need not run to waste.

The legislature might well grant, and the city take, power to lease it. The power to construct and maintain the dam would still rest on the public municipal use; not on the disposition of the accidental excess." 55

This language was quoted with approval in State vs. Eau Claire,(33) and in this case the court sustained an act of the legislature, authorizing Eau Claire to construct a dam to supply the city with water, and "to let, lease and rent such surplus water-power, flowage, slack water or accumulation of water, or any part or portion thereof, which may not be needed to operate and supply such water-works, and protect and preserve the navigability of the river." (See page 534.)

But answer may be made that the court was not considering the right of the State to water-power, except upon payment for same to riparian owner. 56

This point seems to have been before the court. On page 543, the Chief Justice says: "It was objected to the statute, that it provides for no compensation for lands which may be overflowed by the dam. It is enough to say here, that there is no averment in the information that any lands will be overflowed." It is not possible that water power could be made available where there was no fall in the river. The court assumed that the possi-

NOTE 33—State vs. Eau Claire, 40 Wis., 533, 541–2. 33

57

bility of water power, which the riparian proprietor could not make available, was not riparian property.

In Lawson vs. Mowry (34), Judge Cassody said: "The right to create and maintain the power, as well as the canal, was authorized by the legislative grant to Doty, Reeds and their associates; and, to be rightfully enjoyed by others, it must be derived from them or some of them.

By means of the dam, canal, embankment and lock, the power derived from the surplus water could be made available at the lots in question by means of an artificial channel; but the right to create such channel, and use such power at the lots was not
58 derived exclusively from the ownership of the lots themselves, but reached back to the authority to create and maintain the dam, canal and lock, and to use the surplus water for hydraulic purposes."

In Smith vs. Ford (35), Judge Taylor says: "It appears that the owners of lot 2, block 40, and the lands adjoining the river on the west side thereof, where the dam is now situated, obtained from the State a right to construct a dam across the river at that point for hydraulic purposes, and to sell and lease the right to use the water from such dam. Without this grant from the State, the owners of said lands, though owning the soil under the river, had no power to construct a dam thereon."
59

The riparian rights of owner of lands bordering upon navigable rivers are fully discussed and enumerated in Gould on Waters, in Chapter V. Right to water power is not mentioned as one of them.

Houck on Rivers does not mention the right to water power as one of the riparian rights of such owner. Neither is such mentioned in Angell on Water-courses.

NOTE 34—Lawson vs. Mowry, 52 Wis. 219, 237.

60 NOTE 35—Smith vs. Ford, 48 Wis., 115, 164.

The case of Varick vs. Smith ([36]), is relied upon by plaintiff in error. A careful examination of the case will show that it is not in point. In that case a dam was built by the State to raise a head of water to feed the Oswego canal. The dam rested on land of Varick, whose land extended above the dam and below it. Varick contended for the right to use the water power furnished by the dam, and also that the water should pass over the dam to his land below. Smith contended that, under leases from canal commissioners, he could carry all the surplus water around Varick's land below the dam, and prevent his making use of it at dams to be built on Varick's land, below the State dam. No such claim is made here.

It is there stated (p. 560) that the commissioners were authorized "to enter upon, take possession of, and use all and singular any lands, waters and streams necessary for the prosecution of the improvements intended by the act." Under this act the Court says: "What then * * was taken and appropriated to the public use? Clearly all the land and water which were necessary for the improvement which the commissioners were then prosecuting. In other words, they took all the land and water necessary for the furnishing of an adequate supply of water for the Oswego canal. Was the water accumulated in that dam, from the moment it passed over the top of the dam, and in its descent to the bed of the stream below the dam, necessary for the supply of the Oswego canal? On the contrary, the moment it commenced its descent it was incapable of being appropriated to that purpose, and it ceased to be consecrated to the public use. It had become physically impossible to appropriate it to such use. The public property in it had ceased to exist; and in my judgment, the right of the riparian owner, which had been suspended, revived and reattached to it in full force, subject to no restriction except

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NOTE 36—Varick vs. Smith, 5 Paige, 137.
Same case, 9 Paige, 546.

63

that servitude to public interest, for the general purpose of navigation, which existed before the erection of the dam."

In that case the legislature had not attempted to appropriate the incidental use of the water-power as in the case at bar. And in that case Varick only claimed to use the water after it passed the State dam, and not to tap the State dam and draw from it, as defendant is doing in this case.

The Court says, on page 563, "In granting this lease, my opinion is that the canal commissioners exceeded their authority." But on the point, Could the riparian owner, Varick, draw from the pond? the court says, on page 560: "And as this dam was erected by the State, it became public property so that no
64 person possessed the right of drawing off any portion of the accumulated water, through the dam itself, by inserting a flume and gate in it; for that would involve a trespass upon the property of the State. The consideration, however, does not effect the right of the riparian owner to the water after it escapes over the dam."

On the former hearing of the case, Chancellor Walworth says on page 158: "The eightieth section of the title of the Revised Statutes, relative to the canals, (1 R. S. 231) does not appear to apply to such a case. The object of that provision of the statute was to give the owner of mills adjacent to a state dam, the
65 benefit of a head of water created at the expense of the State, so far as water was not wanted for State purposes; *upon the payment by such mill owner*, of a reasonable equivalent therefor. Such a head of water being created for the legitimate purposes of public improvement, no one has a right to tap the state dam, so as to draw off any portion of the artificial pond, without the consent of the legislature or its legally authorized agents." ([37])

NOTE 37—§ 80. Whenever the canal commissioners shall construct a dam across any river or creek, to raise a head of water for the use of a canal, by means whereof, any works
66 adjacent to such river or creek, in which water power is em-

This language seems to fit all the aspects of this case. It seems to sustain the appropriation by the public, and to forbid the tapping of the mill pond. Here we have the opinion of Chancellor Walworth that the State might take to itself the hydraulic power created by dams built by it. Such seems to be the effect of the canal law of New York herein referred to by him.

It has also been held that the State may take any public waters; and that the riparian owner has no property therein, as against the State, entitling him to compensation.

Such rule has been adopted where the public water, or stream, was taken for the improvement of the navigation of that body of

ployed, before such time legally used, may be benefitted without prejudice to the canal, the owner of such works, for their benefit, shall be entitled to the use of the surplus water, upon his complying with the following conditions: 67

1. He shall construct, under the direction of the canal commissioners, a good and substantial raceway and gate in such dam, to draw off as much of the surplus water as works may require.

2. He shall give such security to the people of this State as the canal commissioners shall deem sufficient, to keep such gate and raceway in complete repair, so as to prevent any waste of water.

3. He shall, within ninety days after such raceway and gate shall be completed, apply to the canal appraisers, and request them to ascertain the benefits accruing to him, from the use of such dam, or other erection. 68

4. Within ninety days after such benefits shall have been ascertained, he shall pay the sum at which they shall be estimated, into the treasury.

Sec. 81 provides for appraisal of amount to be paid.

Sec. 82 provides for shutting off water of land owner who does not pay appraisal.

Secs. 75 and 86 provide for sale of surplus water when the person entitled to first privilege shall not take same, "or there shall be no persons so entitled." 69

water or stream ([38]). The same rule has been adopted where the public water, or stream, was taken for the improvement of another body or stream ([39]). Also, where the public water, or stream, was taken for any other use by public authority ([40]).

NOTE 38—Cohn vs. Boom Co., 47 Wis., 314, 322.
Impt. Co. vs Lyons, 30 Wis., 61, 65.
Boom Co. vs. Reilly, 46 Wis., 237.
Lansing vs. Smith, 8 Conn., 148-9.
Tinicum Co. vs. Carter, 61 Pa. St., 31.
Shrunk vs. Schuylkill Nav. Co., 14 S. & R. 71, 80-1.
Com'th vs. Fisher, 1 Penn., 462, 467.
Holyoke Water-Power Co., vs. Connecticut River Co.,
70 20 Fed. Rep., 71, 78, 79.

NOTE 39—Black River Impt. Co. vs. La Crosse Co., 54 Wis., 659, 679 to 686.
Rundle vs. Delaware Co., 14 How. 80, 93-4
Transportation Co. vs. Chicago, 90 U. S., 635, 643, 644-5.
Canal Appraisers vs. People, 17 Wend., 571, 616.
People vs. Canal Appraisers, 33 N. Y., 461.
McKeen vs. Canal Co., 49 Pa. St., 424, 434, 436, 440.
Monongahela vs. Coons, 6 W. & S., 101, 113-4-5.
Zimmermann vs. Canal Co., 1 W. & S., 346, 352-3.
Commissioners vs. Withers, 29 Miss , 21, 31 to 40.
Affirmed on Error, in 20 How., 84.
71 Hollister vs. Union Co., 9 Conn. 436, 443-4-5.

NOTE 40—Woodman vs. Kilbourn Co., 1 Biss., 546, 554.
Att y Gen'l vs. Eau Claire, 37 Wis., 400, 434-5.
State vs. Eau Claire, 40 Wis., 533, 542-3.
Fay vs. Acqueduct Co., 111 Mass., 27-8.
Lister vs. Plankroad, 36 N. J. Eq. 477, 479.
Stevens vs. Railway, 34 N. J. Law, 532, 538-9.
Att'y Genl. vs. Stevens, 1 N. J. Eq. 369, 380.
Sugar Ref. Co. vs. Mayor, 26 N. J. Eq. 247, 252-3.
Monongahela vs. Kirk, 46 Pa. St. 112.
Atkinson vs. Savage, Hazard's Reg. 1834, cited in 17
72 N. H. 226, 227.

In Woodman vs. Kilbourn Co., Judge Miller said: "The act authorizing the construction of the dam in question is in the nature of a public grant of the use of surplus water of the river for the improvement and development of the country, and for the accommodation of the people in the vicinity."

In the Black River Co. vs. The La Crosse Co., Judge Taylor said, pp. 679, 680, "It is claimed that the riparian owner on a navigable stream has no right as against the public, or persons, or corporations acting in behalf of the public, making improvements of such navigable stream, to have the waters of such stream flow in their accustomed course in front of his lands; and this contention * is, we think, sustained by the most learned Courts of this country; and that doctrine has been quite clearly sanctioned by several decisions of this Court." 73

In McKeen vs. Canal Co., Judge Agnew says, on page 440, "Every one who buys property upon a navigable stream, purchases subject to the superior right of the Commonwealth to regulate and improve it for the benefit of all her citizens."

In Fay vs. Aqueduct Co., the water of Spring Pond was drawn off by authority of the State to furnish water-works for neighboring towns. Riparian owner complained. Chief Justice Gray said, "The pond and the water therein belonged, not to the petitioners, but to the public; and the legislature, and the respondents under their authority, had the right to take and draw it off for the public use." The public use in this case was drinking and washing. The Court further determined that though the petitioner's estate may have been injured, no part thereof had been taken by drawing off the waters of the pond. That is, the ripar- 74

Dover vs. Portsmouth, 17 N. H. 200, 226.
Bailey vs. Railroad, 4 Harr. (Del.) 389, 395-6.
Green vs. Swift, 47 Cal. 536.
Martin vs. Waddell, 16 Peters, 367.
Bucclench vs. Met. B'd, L. R. 5 Ex. 221.
The King vs. Smith, Douglass 441. 75

ian owner on a public water has no property in the water; and the public may do with it as it chooses. The Judge said, on page 27, "Great ponds are public property, the use of which for taking water or ice, * * may be regulated or granted by the legislature at its discretion."

In the Black River case, Judge Taylor, expressing opinion of the Court, says (p. 683), "The doctrine of the cases above cited, has, as we think, been fully adopted by this Court in all cases where the interference with the waters of a navigable stream has been for the improvement of the navigation thereof. Whether this Court has decided or will decide, that the State may, for any and all public purposes, intertere with the waters of a navigable
76 stream, whereby injury may result to the riparian owner, without making compensation therefor, need not be determined in this case. * * And, as against the State, we think this Court has determined, that the riparian owners, * * have not the absoute right to have the waters of said river flow as they were accustomed to flow in front of, or through their lands."

The limitation upon legislative power of the State is the State constitution. The only provision in question here is this (Sec. 13, Art. 1.). "The property of no person shall be taken for public use without just compensation therefor." If the riparian owner has property in the waters of the navigable
77 river, or in the flow thereof past his land, then it cannot be taken for public use without compensation. If it can be taken for public use without compensation, it is because he has not property in it as against the State. It logically follows, then, that the riparian owner on a navigable stream has, as against the State, no property in the waters of the stream, or the flow thereof along his shore. If not, then such water and the flow thereof is the property of the state and subject to its disposition, as Judge Gray said in Fay vs. Acqueduct Co.

But the disposition of the hydraulic power herein is to the
78 public use. It is in aid of the navigation of this stream. The

proceeds thereof have been expended upon this canal, made for public use. (See Note 6.) The water not necessary for navigation has been converted into improvements, to make the balance of the water available, in canals and locks.

Suppose there had been a fall of ten feet on the Black Snake, practically valuable for water power on defendant's lands, and the like fall on the Black river; would that have changed the rule? Evidently not. That would have transferred the water power from the Black Snake to the Black. It would be useful to somebody on the Black. Evidently it could be used under authority of the legislature. To complete the parallel, suppose it to to have been granted by the legislature to the Black River Improvement Co., in consideration of, and as a fund to aid in, the 79
improvement of the Black.

In Attorney Gen. vs. Stevens, Chancellor Vroom said (p 380): "The right to the use of this navigable stream is a right common to all the people of this state. * * It is their property, and as such may be disposed of for the common benefit in such way as they may see fit. This disposition can only be made by the legislature of the state * * and when such disposition is made, consistently with the principles of the law of nature and the constitution of a well ordered society, it must be considered valid." True, this was said in relation to the taking away or injuring riparian right of navigation. But is riparian right to possibility of water 80
power superior to certain right of navigation?

In Canal Appraisers vs. The People, it was held that "If, in the improvement of the navigation of a public river, the waters of a tributary stream are so much raised as to destroy a valuable mill site situate thereon, and the stream be generally navigable, although not so at the particular locality of the mill site, the owner is not entitled to damages within the provisions of the canal laws directing compensation to be made for private property taken for public use." (Syllabus of case.)

In 1816, the legislature of Pennsylvania incorporated the 81

Schuylkill Navigation Co., and declared that it should "be entitled to all the water power from the said river, sluices or canals, * * or they may sell in fee simple, lease or rent * * * the said water power." This company sold the water power at Fairmount to the City of Philadelphia. The city erected the Fairmount Water Works. The suburb of Spring Garden took water from the pool for domestic uses. Philadelphia attempted to restrain it, on account of diminution of water power. Learned lawyers argued the case, and it was decided by Chief Justice Gibson, in 1847, thirty-one years after the legislative grant. It was not contended in argument, or hinted at in decision, that the legislative grant of the water power was not valid, or that it was a taking of prop-
82 erty of riparian owner. The Court did, however, hold, that such grant did not purport to exclude the use of the water for domestic purposes, even if such use did somewhat diminish the water power ([41]).

If the United States should build the Hennepin Canal, would it be compelled to pay for the diminution of water power on the St. Lawrence? If the United States should build a canal from Lake Superior to the Mississippi, or if Michigan should build a canal from Bay de Noquet to Lake Superior, could the riparian owner at Sault St. Marie be entitled to compensation?

A dam in a navigable river without legislative authority would be a nuisance ([42]). Any structure, not authorized by legislation,
83 which would make hydraulic power for plaintiff in error, on their land, would be a nusiance. It follows that the interest of grantor, of plaintiff in error, in the water power, when the state passed the act of appropriation, was a possibility that the legislature would permit him to erect and maintain a nusiance, provided, he paid all damage for flowage. Such a possibility can hardly be called property.

NOTE 41—Mayor vs. Commission's, 7 Pa. St. 348, 367-8.

NOTE 42—Cases cited in Note 31, and

Rundle vs. Del. Co., 14 How., 80.

84 Monongahela Co. vs. Coons, 6 W. & S. 101, 112.

But counsel say the riparian owner may project a wing dam half way across the river. If so, so may the opposite riparian owner, and then there is a dam across the river.

True, some of the cases cited rest on the ground that the riparian owner does not own the river bed; while in Wisconsin it is held that he does. But Wisconsin had not declared against the "better doctrine," as held by Barney vs. Keokuk, until December, 1853, by Jones vs. Pettibone. Before that decision the "better rule" must be supposed to have prevailed. The legislature must be supposed to have acted on that "better rule." In the absence of any decision by the Supreme Court of the State, the action of the legislature was the best evidence of the position of State. 85

This reservation of water power to the state, and grant of it by the state, has been held a valid reservation and grant by the Senate of the United States, by officers of the United States, by the arbitrators between the United States and the Canal Company, by State legislative committees, State officers, Governors, and the State legislature. The history of State and United States legislation, and official action of State and United States, shows uniform recognition of title of defendant in error under this grant. Official action, legislation and large business investments have proceeded in faith on this title. And on faith therein, individuals and corporations have furnished large amounts of money to fulfill State obligations and pay State debts. For thirty years a title thus publicly asserted has stood practically unquestioned. 86

THE BUILDING AND MAINTAINING OF THE DAM WITH RIGHT TO CONTINUE SAME.

Of what does a water-power consist? In the weight of water and the power given out by its falling from one level to another. Who owns the right? There are cases in which this right depends on bargain. There are, no doubt, peculiar cases calling for peculiar answers to this question. Here there is no 87

bargain. The answer seems to be direct and simple. The right here, evidently is in the one who maintains, and has the right to maintain the difference in the levels. The maintaining and the right to maintain, united, must give the property, in the absence of any agreement, express or implied.

Defendant in error built and has maintained the dam.

The right to build the dam was granted by the State, the only source of that power, in consideration of fulfillment of State obligations. Such grant is exclusive (43).

The right of flowage has been secured by purchase and prescription by defendant in error and its grantors. Plaintiff in error has never been liable to any action for damages on account
88 thereof. Defendant in error has secured the right to land the dam on the north side by purchase and on the south side by limitation. It had been maintained there thirty years when this action was commenced. Plaintiff in error does not ask its removal, but seeks the advantage of its maintenance.

What, then, is lacking to complete the exclusive right to draw this water from one level and discharge it on another?

In Lawson vs. Mowry, Judge Cassoday says, on page 237-8, "It was the legislature which gave the authority to obstruct the the channel of the river by the building of the dam and canal, and to make use of the water-power thereby created for navigation,
89 and the surplus for hydraulic purposes. * * It is the fall of water which gives the power, and the power which gives the value for hydraulic purposes. The right to create and maintain the power, as well as the canal, was authorized by legislative grant to Doty and Reeds, and their associates and, to be rightfully enjoyed by others, it must be derived from them, or some of them.

By means of the dam, canal, embankment and lock, the power derived from the surplus water could be made available at the lots in question by means of an artificial channel; but the right
90 NOTE 43—Cohn vs. Boom Co., 47 Wis. 314, 323.

to create such channel, and use such power at the lots, was not derived exclusively from the ownership of the lots themselves, but reached back to the authority to create and maintain the dam, canal and lock, and to use the surplus water for hydraulic purposes; any other theory would leave the owner of every dam and water-power at the mercy of every person owning land, from the pond above the dam around the same to the river below, and through which an artificial channel could be cut. It would take from the dam, and the water power created by it, much of its value, and transfer it, without consideration, to lands in the vicinity."

In Smith vs. Ford, Judge Taylor says on page 165, "The leases and conveyances gave to the grantees and lessees, their 91
heirs and assigns, the right to maintain said dam across the river where the same was located; and no subsequent conveyance by the original owners, of the dam itself, or of the lots at the end thereof, could take away such right. If, in exercise of the right given by the law authorizing the construction of the dam, the owners thereof had sold all the water which the dam afforded, with covenants on the part of their grantees, their heirs and assigns, to keep up and maintain the same, it seems to us that if the original owners had retained the title to the lots on either side of the river at the ends of the dam, they would have had no title left to the dam itself, or the lands upon which it rested, but 92
that such right and title would have passed to these grantees, who had covenanted to keep the same in repair, and who would be the only persons interested in its future maintenance, * * "

The Court held that the actual building of the dam, with the franchise, and a right to rest same on the land, carried the ownership of the hydraulic power, as against the owners of the lands at the ends of the dam. Just that is the claim here.

What right does def't in error oppose to this? The ownership of the dam-landing, subject to right of def't in error to maintain the dam; and the ownership of a few hundred feet of bank above 93

the dam, and which plaintiff has acquired the prescriptive right to embank and flow.

The building and maintaining the dam, and acquiring right to maintain same, and right of flowage, and exclusive control of the franchise, without which dam could not be built, would seem to give title to the hydraulic power thereby created, as against one claiming only ownership of shore, subject to right to land dam and subject to flowage (44).

What Hydraulic Interest was Taken from Plaintiff in Error.

Third—Plaintiff in error has succeeded to Beardsly's title to
94 lot 5. The flowage of the dam is about two miles, (Transcript, 47-64), about one one-thirtieth of which, or three hundred and fifty feet was on lot 5. The fall in the two miles is eight and one-half feet. (Transcript, 64.) It does not appear that any of this fall was on lot 5. The stream may have flowed over it as smoothly before the dam was built as since. Has any fall been taken from plaintiff in error by this act to build a dam and the proceedings thereunder, which did not exist on his land before the work was commenced? Was the hydraulic power of ripari an owners above it on the river taken from it by these proceedings?

Plaintiff in error claims half the water power furnished at or by this dam. (Transcript, p. 21.) It evidently bases its claim,
95 not on the fact that there was originally a fall on lot 5, but, on the fact that the dam is located on its land. Hence it made no proofs as to fall on lot 5.

Suppose the dam had been located below lot 5, could the owner of lot 5 follow his power down to the dam and take it there? If so, this power belongs, not to plaintiff in error (except so far as there was a fall on lot 5) but to the upper riparian owners.

Note 44—Smith vs. Ford, 48 Wis. 115.
Lawson vs. Mowry, 52 Wis. 119.
State vs. Eau Claire, 40 Wis. 533.
96 Clark vs. Brown, 70 Ia. 139.

"The water power to which a riparian owner is entitled consists of the fall in the stream, when in its natural state, as it passes through his land, or along the boundary of it; or in other words, it consists of the difference of level between the surface where the stream first touches his land, and the surface where it leaves it" (45).

The Hunt grant has been held to have vested in defendant in error the riparian rights appurtenant to lots 6 and 7, except those reserved. Water-power is not reserved. (Transcript, 99.) Have we taken from plaintiff in error, without due process of law, what it never owned, and what we bought of Hunt?

97 Answer may be made that, there being no proof whether or not there was a fall on lot 5, the question is one of burden of proof. But we are here at suit of plaintiff in error, who complains of us for having taken its property, without "due process of law."

Mr. Ordway in his brief on motion to dismiss (page 28) says, "It is said in Hoadley's Adm'rs. vs. San Francisco, 124, U. S., 644. that when a case is brought from a State Court, the first duty of this court is to enquire '*whether there is* * * * *such right of property as is alleged.* The existence of the * * right is part of the federal question itself.' If such is the duty of the court, it would seem to be duty of Counsel also." On page 39 of this brief on the merits Mr. Ordway says "It may be, so 98 far as we can learn from this record, that there was as much as three or four feet or more fall upon lot 5." But on page 38 he says: "*There is no proof to be found in the record as to how much fall there was in the river above the dam upon lot* 5." This is a matter susceptible of proof. A survey of the river bed above the dam would readily tell. Both counsel for plaintiff in error make

NOTE 45—McCalmont vs. Whitaker, 3 Rawle 84, 90.
Lawson vs. Mowrey, 52 Wis., 219, 236.
Brown vs. Bush, 45 Pa. St., 61, 66.

99

of making slack-water navigation. This would be a fraud on the United States; a misappropriation of the trust fund; a breach of the spirit of the grant and its acceptance.

The primary purpose of the condemnation of lands by the Board of Public Works is public—that of improving navigation. The creation of the hydraulic power is secondary. Where the primary object of the exercise of eminent domain is public, the fact that a private use, not alone justifying such exercise, is also subserved, does not invalidate the exercise of that right. ([47])

In Heyward vs. Mayor of New York, land had been condemned for alms house purposes, under an act authorizing the
106 condemnation of the fee. The alms house was discontinued. The city platted the lands and sold the lots. Charles O'Connor, for original owners, claimed that the use, only, was necessary for an alms house; and, that on discontinuance of same, the original owner held the fee, relieved of the easement. The Court held, (pages 325-6): "After the lapse of 26 or 27 years circumstances had arisen justifying a removal of the alms house establishment to another place, and it followed that the identical lands in question were no longer required at that place for the purpose

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NOTE 47—Atty-Gen. vs. Eau Claire, 37 Wis., 400, 435.
State vs. Eau Claire, 40 Wis. 533, 541-2-3.
107 Hubbard vs. Toledo, 21 O. St. 496.
Malone vs. Toledo, 34 O St. 541.
Water Works Co. vs. Burkhardt, 41 Ind. 364
Cronne vs. Canal Co., 71 Ind, 208, 211.
Wyoming Coal Co. vs. Price, 81 Pa. St. 156.
Dingley vs. City of Boston, 100 Mass. 544, 559.
Heyward vs. Mayor of New York, 7 N. Y. 314, 326.
Rexford vs. Knight, 11 N. Y. 308, 314.
Spaulding vs. Lowell, 23 Pick. 71, 80.
George vs. School Dist., 6 Metc. 497, 510.
French vs. Quincy, 3 Allen, 9, 12, 13.
Railroad vs. Davis, 2 Dev. & R. (N. C.) L. 451.
108

for which they had been taken. If under such circumstances they are to revert, it must be for the reason that the corporation had only acquired a use, upon the determination of which their right was at an end. If this be so, the appellants, it seems to me, are entitled to the whole reversion without accounting for what they or their ancestors have received. Their title, if they have any, is a legal one. It is the same which their ancestors had when the lands were taken.

To uphold their claim would be to establish a principle pregnant with great injustice, and most mischievous in its consequences. Suppose the corporation had at their own expense, and in good faith, covered the lands in question with expensive buildings for the uses of the alms house, and circumstances, unforseen 109
by them, had rendered necessary a removal of the establishment to an adjoining block, and the possession of these lands thereby become unavailable for the purpose originally contemplated, and for which they were appropriated. The appellants would have the right to resume them, upon the same principles which would entitle them to prevail in this case. No one can fail to see the iniquity of such a result. It would be paying them in full for the lands, and allowing them to have them also."

Neither does the right stop exactly at the line of the public use, where the private use is so intimately connected with the public that the outlay to secure the public benefit would necessa- 110
rily create the private use (47).

Dingley vs. Boston seems, on principle, to cover the exact ground here taken. In this case about sixteen acres of land in Boston was rendered too low for drainage by the filling of its drainage basin, the Back Bay, by the City. The City was authorized to condemn the fee of this tract, in order that it might fill it, and abate the nuisance. Chief Justice Chapman says, (pp. 558-9): "It is contended that, as the only object of the act is to abate a nuisance, the act ought only to have granted the power to occupy the land temporarily until the object of the act should be 111

effected, and it should then be restored to the owners, with a provision that the benefit done to the land should be applied in offset to the damages. It is true that the raising of the grade does not require an occupation of the land for a great length of time. When this work is completed, the nuisance will be abated, and the land will be in a condition to be occupied by private persons. But its condition will be greatly changed; almost as much as raising flats into upland. The former surface will be deeply buried under the earth that will have been brought upon it, and the changed condition is to be perpetual. If the old property is restored, the new property which has annexed to it must go with it. This would be very unjust to the city, who have been com-
112 pelled to incur the great expense of destroying the nuisance, unless the owner were required to make a reasonable compensation, which might be far beyond the amount of the damages to which he would be entitled.

It would be difficult to adjust the matter; and in many cases it might operate harshly upon the owner to compel him to take and pay for improvements. On the whole, therefore, the plan of compelling the city to take the land in fee simple, and the owner to part with his whole title for a just compensation, would seem to be the most simple and equitable that could be adopted, unless there is some objection on the ground that a fee simple is more sacred than an estate for life or years, or than an easement of
113 greater or less duration. We can see no ground for regarding one of these titles as more sacred than another, or for regarding land as more sacred than personal property."

To substantially same effect in principle, is Spalding vs. Lowell and other cases cited.

The New York cases ([48]) holding that the State cannot take the whole lot when only a part of same is needed, seem to me not to apply to this case. This case seems analogous to those which relate to the estate taken, rather than to those relating to

NOTE 48—Matter of Albany St., 11 Wend., 156.
114 Embury vs. Connor, 3 N. Y., 511.

amount of land taken. The case of Att'y Gen. vs. Eau Claire, seems directly in point. As Chief Justice Ryan says, *Superflua non nocent.*

Again, all the cases hold that it rests with the legislature to determine what private property it is necessary to take for public use.

The general New York canal act provided for taking hydraulic power, and selling or leasing it, as appears from Note 37.

The Ohio canal act of March 23d, 1840, section 20, authorized leasing and sale of surplus water. This act was sustained in Hubbard vs. Toledo.

The Indiana canal act authorized condemnation of fee of lands and water, not mere use. This feature was sustained in 115
Water works Co. vs. Burkhart, and in Cronne vs. Canal Co.

The Pennsylvania canal acts all authorized the taking and using the hydraulic power, as appears from ~~Connors~~ Mayor vs. Spring Garden. 7 Pa. St. 348

ACQUIESCENCE.

If State could appropriate under condemnation, and State has appropriated, the necessary presumption is that the owner consented to the use (49).

Pierson vs. Cin. and W. Canal Co. was ejectment for lands taken for canal without appraisal. The Court said:

"It is said, however, that the defendants had no power to 116
take lands for their canal, except in the mode prescribed in their charter, and they cannot, therefore, defend themselves on the ground that the plaintiff is estopped.

As a general principle, the remark is true; but it cannot be denied that a parol license to enter, for the necessary purposes of

NOTE 49—Pierson vs. Cin. and W. Canal Co., 2 Disney, 100, 104, 105.
Nelson vs Fleming, 56 Ind. 319, 421-3.
Carpenter vs. State, 12 O. St., 457, 461-5.
Corwin vs. Cowan, 12 O. St., 629, 630. 117

the canal, would have protected the defendants from the action of trespass, and if the possession should continue until the statutory limit had arrived, the right of the original owner would be gone; and where, as in the present case, not only the possession was taken by the consent and knowledge of the plaintiff, and an important public work erected, by the outlay of a large amount of money, it cannot be said that the defendants have not the same rights to be protected that pertain to the individual citizen who may have occupied and improved, by expending his labor and employing his capital."

When this dam was built, the country was unsettled and the hydraulic power of very little value. The prospective increase in
118 value of lands near the river, from the making of canal, was so great, that very few riparian proprietors made any claim for compensation for taking of lands for same. The lands were wild lands. The use was freely given. The act provided for appraisal, only "When any lands, waters or material appropriated by the Board * shall not be freely given or granted to the State, or the Board cannot agree with the owner, as to the terms on which the same shall be granted."

If, under the act, the right to maintain the dam, which necessarily includes the flowage, has been acquired, then the incidental right of water-power goes with it under the act. If the
119 right has not been acquired, then it follows that the dam, wrongfully there, should be removed. It is not logical to say, that for one of the purposes for which it was built, to-wit, navigation, the right to maintain it has been acquired; but that for the other purpose for which it was built, to-wit, to furnish water-power for State, no right to maintain it has been acquired.

When the purpose of the appropriation of the dam-site was notorious, the right acquired by the appropriation equals the purpose.

It is no answer to say there has been no appraisal of damages.
120 No damage has been claimed.

The change in dam-landing of forty feet, made in 1876, does not affect the question. The substance is, the right to maintain the dam and necessarily, the flowage as it has been maintained under act of 1848, and subsequent legislation; not the precise point at which it may be maintained (50).

The right of defendant in error was complete, under all points made herein, before the United States changed the location of the dam by virtue of its sovereign power. The flowage was not changed. Defendant in error had the grant by the State. It also had the right by limitation, for it had maintained the dam and embankment and flowage over twenty years. It had also, for same reason, all the right gained by waiver of condemnation for over twenty years. Further than that, the old dam is there now. 121
It was not removed. An opening was made through it to drop a scow down to aid in building the new dam. If the United States should abandon the new dam, or if, for any reason, it should be removed, it would only be necessary for defendant in error to repair the old dam, to preserve the water-power and navigation. (Transcript, pp. 63, 66.)

TAKING WATER-POWER NECESSARY.

The taking of the water-power rights of all riparian owners, except those on whose lands the dams rested, was necessary. All of this eight and one-half feet fall, except what, if any, was on lot 5, was necessarily taken from the lands of ripar- 122
ian owners in the two miles flowed above lot 5. The taking of this power by the raising of the water on their lands could not be avoided. If this is property, entitling the riparian owner to

NOTE 50—Stackpole vs. Curtis, 32 Me., 383, 386-7.
Davis vs. Brigham, 29 Me., 391, 402.
Carlisle vs. Cooper, 21 N. J. Eq., 576, 595.
Ogle vs. Dill, 55 Ind. 130.
Johnson vs. Rand, 6 N. H. 22.
Stowell vs. Flagg, 11 Mass. 364.
Farrington vs. Blish, 14 Me. 423. 123

compensation for the taking thereof, then each riparian owner, whose fall was destroyed, was entitled to compensation for what he lost thereby. If compensation was made, or if none was required, it became the property of the defendant in error. Evidently, this two miles fall was taken by the state, and was paid for out of the trust fund, and its value has been applied by the United States to pay for this improvement.

Plaintiff in error claims half the water power furnished at this dam. (Transcript p. 21.) It does not so much claim that its property was taken without due process of law, as that other riparian owners' property, having been taken and paid for out of trust funds, pledged for public use, shall, because brought within
124 its reach, be possessed and enjoyed by it.

Suppose the dam had been located below lot 5. Would plaintiff in error say water power could not be taken? If not, no compensation could be claimed for it. What, then, would become of its claim to water power?

The canal cases in New York and Ohio, deciding that the State had no authority to withdraw from the streams any more water than necessary for navigation, have no bearing on the case at bar. The canal acts of New York and Ohio provided for navigation by canals, and for feeding the canals from rivers. The Wisconsin act provides for slack-water navigation of two great rivers. The
125 canals in Wisconsin were not to be the main feature, but were simply for carrying around the rapids. In fact, throughout about two hundred miles of improvement now in use, there is only about six miles of canal.

There were no great water-powers to be created at and by the dams in New York and Ohio, and, so, no such provision was made by their statutes, as that under consideration. The nearest approach I find to it is in section 80, found at note 37. That section seems to be sustained by Chancellor Walworth.

The surplus water, which those cases hold that it was not
126 necessary to take, is water taken into the canals, out of the

river, to feed the canals. Evidently it was not necessary to withdraw from the river into the canals more water than was required for navigation. So the canal acts made no provision for taking the surplus. Here it was necessary to dam the entire river, and *create*, as the statute says, a water power. The point will be readily seen, by comparing the cuts in use to illustrate this case with that found on page 46 of Mr. Ordway's brief. The contention there was, not over the power created by the dam on Cornelius Wilson's land, but over the right to take into the feeder at that dam more water than necessary for use of the canal, and to carry it around and return it into the river below, intervening riparian owners.

Most if not all the New York and Ohio canal cases arise 127
from taking the water of private, and not public, streams.

DUE PROCESS.

Counsel for plaintiff in error treat "due process" as requiring, in condemnation cases, a sufficient fund. They urge that, in this case, a sufficient fund is not provided.

Does "due process" require a sufficient fund? In Davidson vs. New Orleans Justice Miller said on page 105, "If private property be taken for public uses without just compensation, it must be remembered that when the fourteenth amendment was adopted, the provision on that subject in immediate juxtaposition in the fifth amendment with the one 128
we are construing was left out, and this was taken." Also see cases cited in note 28. If the taking of private property without compensation does not violate the "due process" clause, how does that clause involve the kind of compensation, or fund from which it is to be made?

What fund is provided? In 1876 Congress provided that "In case any lands or other property is now or shall be flowed * * for which compensation is now or shall become legally owing * * * * the amount of such compensation may be ascertained in the mode provided by the laws of the state 129

wherein such property lies." (Chap. 166.) The laws of Wisconsin then provided that in case possession had been taken without award "or if at any time after an attempt to acquire title by purchase, eminent domain or otherwise, it shall be found that the title thereby acquired is defective * * * the party interested in such lands may institute and conduct the proceedings to a conclusion, if the corporation delays or omits to prosecute the same, at its cost and expense." The conclusion herein referred to is an award of arbitrators on which execution may be had, if payment is not made in sixty days, or in case of appeal a jury trial and a common law judgment (51). True, execution against the United States would
130 be unavailing; but it must be presumed that the claimant having a judgment against the United States would receive his pay. A pledge of the credit of a town, or county, or state has been held a sufficient fund (52). In Great Falls Manufacturing Co. vs. Garland (53) an act of Congress substantially like this as to fund for compensation was held valid. On

NOTE 51—Secs. 1850, 1851, 1852, Wis. R. S. 1878, being Secs. 18, 19 and 22 of Chapt. 119, Laws of 1872, as amended by Secs. 2 and 4 of Chapt. 291, Laws of 1873. See Sanborn and Berryman's Annotated statutes of Wisconsin. These statutes apply to condemnation by United States; sec. 2, ch 291 Laws Wis. 1874.

131 NOTE 52—Conn. R. R. Co. vs. Co. Cmrs, 127 Mass., 50.
Talbot vs. Hudson, 16 Gray, 417, 431.
State vs. Messenger, 27 Minn., 119.
Application of New York, 99 N. Y. 569.
Chamberlain vs. Morgan, 68 Pa, St. 168.
Long vs. Tuller, 68 Pa. St. 170.
Brock vs. Hishen, 40 Wis., 674.
Jeffersonville vs. Dougherty, 40, Ind. 33.
McCormick vs. Lafayette, 1 Ind. 47.
Rodger svs. Bradshaw, 20 Johns 744.

NOTE 53—25 Fed. Rep. 521, 522, 529, 530.
132 124 U. S. 581, 599.

appeal Justice Harlan said, "It is to be assumed that the United States is incapable of bad faith and that Congress will promptly make the necessary appropriation, whenever the amount of compensation has been ascertained in the mode prescribed by the act of 1882."

SUBSEQUENT LEGISLATION.

May this act of Congress of 1876 be considered? This case is unlike Conn. River R. R. Co. vs. Commissioners (54). There, the law providing the fund was enacted after suit brought and final argument. Chief Justice Gray said, (157) "we have no information of any new taking since the passage of the St. of 1879." Here the taking, including flowage, was
133 acquiesced in for twenty years before the act of 1876, and nine years after, before action. The taking is still acquiesced in so far as there was any entry on lands. Plaintiff in error still seeks to avail itself of the dam and embankment on its land. The entry to build, and the building of, the dam and embankment were the real taking. The flowage necessarily followed.

Where there has been acquiescence in the entry of a party claiming under right of eminent domain, the settled policy of Wisconsin has been, to give the owner his remedy by award, and not by ejectment or trespass or forcible entry (55).

134 Statutes which authorize the taking, but do not make proper provision for compensation, are held valid so far that

NOTE 54—Conn. R. R. Co. vs. Co. Comrs., 127 Mass. 50.

NOTE 55—See Statutes cited in Note 51.
Also, Hamlin vs. Railway, 61 Wis. 515.
Buchner vs. Railway, 56 Wis. 403.
Buchner vs. Railway, 60 Wis. 264.
Railway vs. Strange, 63 Wis. 178.
Taylor vs. Railway, 63 Wis. 327.
Cassidy vs. Railway, 70 Wis. 440.

135

they may be aided by a subsequent act providing compensation ([56]). It seems that the first act is a sufficient declaration of the necessity for taking, and the second, providing for compensation, completes it.

No Condemnation of Water Power.

It is urged that the act of Congress does not provide for condemnation of water power.

The language of the act is, "In case any lands or other property is now or shall be flowed or injured." This language is apt to include the fall of water on ones land, which has been drowned out by flowage. The taking of the water power by flowage was necessary to the making of the im-
136 provment. It was a certain result of the building of the dams.

Argument of counsel on this point rests on the untenable assumption that the water power was all taken from the owner of the parcel of land on which the dam landed.

I urge further on this point, that the United States, having received, in reduction in price of the works by the arbitrators, the value of this water power, was, in honor, bound to assume the flowage damages consequent on its taking. Chapter 166 must be construed in view of that obligation.

Logical Outcome.

137 The logical outcome of a reversal of the judgment herein would be, not the enjoyment of this water power by plaintiff in error, but the destruction of that, and of this whole improvement. If water power cannot be taken, or there has not yet been provided any due process of law for taking of same, on what right can the dam stand against the conten-

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Note 56—State vs. Seymour, 35 N. J. L. 47, 56., approved in Greenville vs. Seymour, 22 N. J. Eq. 458. 460.
Railroad vs. Turner, 31 Ark. 494, 504.
138 Mc Cauley vs. Weller, 12 Cal. 500, 531.

tion of those riparian owners on the river whose lands have been flowed, and whose fall has been destroyed?

No doubt the government, state or federal, has the inherent right to build a dam in the bed of the stream within limits of low water; but it has no inherent right to build embankments on the lands of riparian owners or to flow their lands, the admission of plaintiff in error to that effect, notwithstanding.

MOSES HOOPER,
For Defendant in Error.

the owners and parties interested therein, and such other facts touching the same as said company shall see fit to make. If such real estate is desired for the main line of the railroad of such company, or in part for the main line and in part for station or building grounds, yards or other purposes, said petition shall state that such company is duly incorporated, that it is the intention of the company, in good faith to construct the road authorized by its charter, that said company has surveyed its route over the lands sought to be acquired for its main line, and has actually staked out the center line of its proposed road over grounds desired for such main line, and shall contain a description of the lands
148 across which said line shall have been so staked out by the subdivisions of the government survey, and in case a greater width than one hundred feet shall be desired to be taken across any tract, shall specify the width desired across the said tract, and shall contain a description of the land sought to be acquired for depot, station or building grounds, and the other purposes of said company, that the route of said road has been located by its board of directors upon the line so staked out, and that the real estate so described is required for the purpose of constructing and operating the proposed railroad, the names of the parties who own and occupy said real estate, as near as may be, and if any such persons are infants, their ages as nearly as may be,
149 and if any are persons of unsound mind or unknown, these facts shall be stated, with such other facts as the company shall see fit to state; said company shall annex to such petition a map showing the route of its said road, and the lands desired to be taken for right of way, and for depots, stations, building grounds, yards, and other grounds, and shall file the same in the office of the clerk of the circuit court of the county in which such real estate is situated. The filing of such petition shall be the commencement of a suit in said court. Upon the filing of such petition, the said court or judge thereof shall make an order, prescribing the notice to be given of the time and place of hearing such petition, which
150

notice shall state the filing of such petition, the object thereof, and shall refer by general description to the lands described in the petition, and shall be addressed to the parties named in the said petition and to all persons interested in said lands, and may be served personally or at the last and usual abode of such owners and parties interested, not less than five days before such hearing, or by publication in some newspaper, to be designated by said court or judge, not less than ten days before the date fixed for the hearing of such petition."

SEC. 15. On presenting such petition to the court or judge, as aforesaid, with proof of publication of notice as aforesaid, all or any of the persons whose estates or interests are to be affected 151
by the proceedings, may show cause against granting the prayer of the petition. If it shall appear from said petition that any of such persons are infants, idiots or persons of unsound mind, the court or judge may, upon notice to their guardian or committee, if they have any, and if not, without further notice, appoint a guardian *ad litem*, to act for said minor, idiot or person of unsound mind in said proceeding, and require him to give proper security. The court or judge shall hear the parties interested, and if no sufficient cause is shown against granting the prayer of the petition, shall make an order for the appointment of three disinterested and competent freeholders, who reside in the county or some adjoining county, where the premises to be appraised are 152
situated, commissioners to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate proposed to be taken in such county, for the purposes of the company, and fix the time and place for the first meeting of the commissioners.

SEC. 16. The commissioners shall take and subscribe the oath prescribed by the twenty-eighth section of the fourth article of the constitution, before entering on the discharge of their duties. A majority of them may adjourn the proceedings before them, from time to time, in their discretion. They shall cause notice to be 153

same, and said court or judge shall, upon the company's giving security in such additional amount as the court or judge shall require, to pay any judgment which shall be recovered against it, on appeal, award such writ. If such railroad company be in possession or put in possession of such land pending an appeal, the owners or parties entitled thereto shall be entitled to receive the money paid into court on account of the award appealed from, without prejudice to the appeal taken, but if the railroad company shall have appealed, such money shall only be so withdrawn upon filing a bond in such sum and with such surety as shall be approved by the court or judge, to
160 repay the amount by which such award shall be abated on such appeal with costs. If the said company shall omit for the space of sixty days to pay the amount so awarded into court, or to pay into court the amount of any final judgment which shall be rendered upon any appeal from such award, the party interested in such award or judgment may have execution upon said judgment, or for the amount of such award upon motion. If any defect of title to, or incumbrance upon any parcel of the premises shall be suggested in said petition, or if any party to said proceeding or any person not a party, shall petition the said court, setting up a claim adverse to the title set out in said petition to said premises, and to the money or any part of it to
161 be paid as compensation for the property so taken, the court shall hear and determine the rights of the parties to said money, and for that purpose may order a reference or an issue to be tried by a jury. Either party may except to the decisions of the court, and appeal to the supreme court, in like manner as in actions. Either court may award costs to the prevailing party, and under [render] judgment therefor against the other party.

SEC. 19. When no appeal shall be taken from any award within the time provided by law, and the railroad company shall have paid the amount thereof into court or filed a receipt therefor,
162 duly signed by the owner, and acknowledged before an officer

authorized to take the acknowledgment of deeds, in the office of the clerk of the court, or when after the determination of such an appeal, the railroad company shall have paid into court the amount of the judgment rendered thereon, or filed a receipt therefor as aforesaid, the clerk of said court shall make a minute of such payment, or of the filing of such receipt, at the foot of the record of the report of such commissioners in the judgment book of said court; and thereupon the exclusive use of said premises, and every part and parcel thereof, shall vest in said company, its successors and assigns forever, without any other or further act, deed or conveyance; and said record, or a certified copy thereof shall be *prima facie* evidence of such title in all courts and places. 163

SEC. 22. In any case where a railroad or railway company shall not have acquired title to any land upon which they have constructed their track or tracks, or if at any time after an attempt to acquire title by appraisal of damages or otherwise, it shall be found that the title thereby attempted to be acquired is defective, the company may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of such new proceedings, the court may authorize the corporation, if in possession, to continue in possession, and if not in possession, to take possession, and use such real estate during the pendency of such new proceedings; and may stay all actions or proceedings against the company on account thereof, on such company paying into court a sufficient sum or giving security as the court may direct, to pay the compensation therefor when finally ascertained; and in every such case, the party interested in such real estate may institute and conduct the proceedings to a conclusion if the company delays or omits to prosecute the same, at the cost and expense of the company. But no injunction to restrain the operation of the road shall be granted until said compensation has been fixed and determined 164

165

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JAMES. H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 701.

THE KAUKAUNA WATER POWER COMPANY, ET ALS.,
PLAINTIFFS IN ERROR,

vs.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF OUTAGAMIE COUNTY,
WISCONSIN.

BRIEF OF DEFENDANT IN ERROR,

ON MOTION TO DISMISS.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 701.

THE KAUKAUNA WATER POWER COMPANY, BRADNER, SMITH & COMPANY, JAMES C. DELANEY, CHARLES D. CASSED, DAVID McCARTNEY, JAMES H. ELMORE, JOSEPH KLEIN, THE MILWAUKEE, LAKE SHORE AND WESTERN RAILWAY COMPANY, THE BADGER PAPER COMPANY, AND B. AYMAR SANDS, TRUSTEE, PLAINTIFFS IN ERROR,

vs.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY, DEFENDANT IN ERROR.

In Error to Circuit Court of Outagamie County, Wisconsin.

Now comes The Green Bay and Mississippi Canal Company, defendant in error, and moves this honorable Court that the writ of error herein be dismissed, for the reason that this Court has no jurisdiction of the same. The ground of this motion is that no question such as is specified in the statutes of the United States, giving this Court jurisdiction to review the decisions of State courts, was drawn in question or was raised or presented on the trial of this cause in the State court of Wisconsin.

MOSES HOOPER,
Attorney for Defendant in Error.

Please take notice that the foregoing motion will be submitted to the above-entitled Court for consideration on the second Monday (the 14th day) of October, 1889, at the opening of Court on said day, or as soon thereafter as same can be heard and considered.

AUGUST 28, 1889.

MOSES HOOPER,
Attorney for Defendant in Error.

TO ALFRED L. CAREY and DAVID S. ORDWAY,
Attorneys for Plaintiffs in Error.

(Endorsed:) Supreme Court of the United States. The Kaukauna Water Power Co. *et als. vs.* The Green Bay and Mississippi Canal Co. Notice. Moses Hooper, for def't in error.

Received within notice and four copies of the argument referred to therein this 29th day of August, A. D. 1889.

ALFRED L. CAREY and
DAVID S. ORDWAY,
Attorneys for Plaintiffs in Error.

(Endorsed:) Supreme Court U. S. 1889, October term. No. 701. The Kaukauna Water Power Co., pl'ff in error, *vs.* The Green Bay and Mississippi Canal Co. Motion to dismiss, with proof of service of notice. Office Supreme Court U. S. Filed Sep. 2, 1889. James H. McKenney, clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 701.

THE KAUKAUNA WATER POWER COMPANY, ET ALS., PLAINTIFFS IN ERROR,

vs.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY, DEFENDANT IN ERROR.

1

IN ERROR TO THE CIRCUIT COURT OF OUTAGAMIE COUNTY WISCONSIN.

Brief of Defendant in Error on Motion to Dismiss.

BRIEF STATEMENT.

Action was brought in Outagamie County Circuit Court, Wisconsin, by Green Bay and Mississippi Canal Company, defendant in error, against the Kaukauna Water Power Company, and others claiming under it, plaintiffs in error, to restrain them from drawing water, for power, from a pond maintained by a dam built for purpose of slack-water navigation, which also furnished valuable 2
hydraulic power. Incidentally, it was also sought to compel the Kaukauna Water Power Company to restore and rebuild a part of the embankment or wall retaining such pond, which had been removed by it.

The complaint was dismissed in the Circuit Court. On appeal to the Supreme Court (court of final resort) of Wisconsin, this decision of the Circuit Court was reversed, and the Circuit Court was directed to enter judgment restraining the Kaukauna Water Power Company, and those claiming under it, from drawing water from the pond for hydraulic power, for the reason that the water power furnished by the pond and dam was the property of 3

the Green Bay and Mississippi Canal Company. But the Circuit Court was directed to refuse the incidental relief, on the ground that the Kaukana Water Power Company maintained a substitute for the embankment, in shape of a bulkhead and head-gates.

The Circuit Court entered judgment as directed.

WRIT OF ERROR.

The Kaukauna Water Power Company, and others claiming under it, removed the contention into this court by writ of error, reciting that, on trial of said action, there "was drawn in question the
4 validity of a statute of, and an authority exercised under, said state, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity."

The plaintiff in error assigns error on eleven grounds (Transcript, pp. 101, 102).

First—That complaint is demurrable.

Second—That the court erred generally.

Third—That the decision violated the fourteenth amendment to United States Constitution.

Fourth, Fifth, Seventh, Eighth, Ninth, Tenth—Same as third.

Sixth and *Eleventh*—That the court erred in construing the statute laws of Wisconsin.

5 It shows that the only error assigned which would give this court jurisdiction, if the point had been raised and presented in the trial court, is the alleged violation of the fourteenth amendment to United States Constitution.

SUBSTANCE OF RECORD.

COMPLAINT.

The complaint shows that the Fox is a navigable river. That the United States, in order to aid in the improvement of the same and of the Wisconsin river, granted to Wisconsin certain lands, by act approved August 8, 1848, "for the purposes contemplated in this
6 act and no other." (Ch. 170, Laws of Congress, 1846.) That on

June 29th, 1848, by act approved that day, Wisconsin accepted this grant upon the conditions named.

That by act approved August 8, 1848, Wisconsin provided for organization of a Board of Public Works, and undertook this improvement. That in such act Wisconsin provided, that "whenever a water power shall be created by reason of any dam erected, or other improvements made on any of said rivers, such water power shall belong to the State, subject to the future action of the legislature." (See Sec. 16, said act, Transcript, p. 2.)

That the dam maintaining the pond in question is one of the dams located by the Board of Public Works of Wisconsin, pursu- 7
ant to such act, and that the water power furnished thereby is one of the water powers specified in such act.

That the value of such water power was necessarily expended in making slack water navigation. That the dam was built in 1855, and had ever since been maintained, unchallenged, by the State, and those claiming under it. That the State, and those claiming under it, had had adverse possession under claim of right of such water power, from the time of the building of the dam in 1855, to time Kaukauna Water Power Company attempted to break the banks of the pond in 1881.

That by grant from the State, in consideration of making the waters navigable, and by building and maintaining this dam, and 8
by statute of limitation, plaintiff acquired title to said water power.

Complaint also sets out part of a deed from Green Bay and Mississippi Canal Company to United States, conveying the line of canals and locks for use of navigation. The material part thereof is as follows:

"* * * Now, therefore, this indenture witnesseth, that in consideration of the premises, and fully to comply with the requirements of the act of Congress approved July seventh, eighteen hundred and seventy, and to accomplish the intents and purposes thereof, * * the said part of the first part, hath grant- 9
ed, bargained, and sold, and by these presents doth grant, bargain,

and sell unto * * the party of the second part, the following described property, rights, franchises, etc., situate in the State of Wisconsin, and described as follows, to-wit: All and singular its property, and rights of property in and to the line of water communication between the Wisconsin River aforesaid, and the mouth of the Fox River, including its locks, dams, canals and franchises, saving and excepting therefrom, and reserving to the said party of the first part, the following described property, rights and portions of franchises which in the opinion of the Secretary of War and of Congress are not needed for public use,
10 to-wit:

"*First*— * * * * *

"*Second*—Also all that part of the franchises of said company, viz: The water powers created by the dams, and by the use of the surplus water not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto. * *"

Complaint also alleges that plaintiff is the owner of all the hydraulic power furnished by the dam, subject only to the rights of the United States to draw water from the pond to fill the canal for purpose of navigation.

ANSWER.

11

Alleges that no part of the land grant was on the Fox River; and that State of Wisconsin, did not on August 8, 1848, or at any time after that, own any lands thereon. The answer denies any knowledge or information, whether or not the 16th section of act of Wisconsin of 1848, relates to the water power in question. It also denies any knowledge or information whether or not the value of this water power was necessarily expended in furnishing slack-water navigation.

It denied plaintiff's ownership of all of the hydraulic power furnished by the pond, but alleges in that behalf, that the defend-
12 ant is the owner of one-half thereof.

It denied the allegations of complaint relative to possession

by State, and the claims under it, under claim of exclusive right to water power.

Answer further alleges title, in Kaukauna Water Power Company, to the dam landing and land above and below it, on south side of river where its canal is. That prior to August, 1835, same were owned in fee by United States, and that same were purchased of the United States on or about September 1, 1835, by the parties through whom the Kaukauna Water Power Company derives title. Answer also set out in full deed from Green Bay and Mississippi Canal Company to United States. (Transcript, pp. 23 to 27.) 13

The answer further says:

"And these defendants deny that either the plaintiff, the Fox and Wisconsin Improvement Company, or the State of Wisconsin, ever had or owned any water, right to water, or water power, (except for purpose of navigation), upon or along said Fox river, except as riparian owners. And these defendants upon information and belief, state that the State of Wisconsin never had authority, under its constitution, to acquire by purchase, condemnation or otherwise, or to accept or receive title to any land or water or water power, along or upon said Fox river, except for the purpose of navigation, and that it never had any 14 right, power or authority to take or condemn private property for the purpose of milling, or manufacturing of any kind, or for the purpose of transfer, or sale, or lease thereof to others, for any purpose other than navigation." (Transcript, p. 22.)

BILL OF EXCEPTIONS.

It appeared that the title to lands on south side of river, from a point above to a point below the dam landing, came from United States to defendant substantially as alleged, and that the patents from the United States did not subject them to any easement in aid of the improvement of the river. Plaintiffs in error also proved the time and manner of building new dam. Also time 15

and manner of building original dam. Their proofs all appear in transcript pp., 73 to 80. No objection was made to any proof of defendant in error which in any way suggests any federal question. Many objections were made to evidence on grounds of immaterality, incompetency and irrelvancy, which were overruled, regardless of their merits. Our trial judges admit all evidence, with slight exceptions, without reference to their own opinions, that the Supreme Court may not reverse on account of exclusion of evidence.

FINDINGS PROPOSED.

16 Plaintiffs in error prososed, and requested the Judge to make, twenty findings. (Transcript pp. 37 to 45.)

They also requested the judge to adopt the following conclusions:

"I find as a conclusion of law, upon the facts, that the plaintiff is not entitled to any relief herein, and judgment is therefore ordered, dismissing the plaintiff's complaint upon the merits with costs." (Transcript, p. 42.)

Defendant in error also proposed findings. (Transcript, pp. 31, 36.

Instead of adopting the findings proposed by plaintiffs in error, or those proposed by defendant in error, the judge himself
17 drew such findings as he approved. (Transcript pp. 45, 48.) Plaintiff in error filed no exceptions thereto, nor any exceptions on account of his failure to make further or other findings, and judgment was entered thereon.

ARGUMENT.

I.

No Federal Question "Raised" and "Presented."

(*a*) An examination of the Answer and Bill of Exceptions will show no reference to any federal question, though the statu-
18 tory provision which the plaintiffs invoked, is set out in the complaint in full.

(*b*) Sec. 2863 R. S. Wis., 1878, provides, that "upon a trial of a question of fact by the Court, its decision shall be given in writing, and filed with the clerk within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly, as of the term at which the case was tried, and the judge shall state in his decision separately:

1. The facts found by him; and
2. His conclusion of law thereon."

Counsel for each party is entitled to, and in important cases ordinarily does, draw and submit to the judges, a statement of such facts and conclusions of law as he thinks the judge should find. Then, if the judge declines to find as requested, his duty is to file exceptions to the refusal. He is thus able to review on appeal or writ of error, the decision of the judge upon the questions thus presented for his decision ([1]).

This statement of the facts, and the conclusions of law, upon which the court rests its judgment, with the exceptions to the conclusions found and not found, takes same place in the record as the verdict of a jury and the instructions given and refused.

The instructions asked by either party show the position of that party upon the law. So the request of the party for findings and conclusions shows his position, and the points he relies on in an equity case under the code ([2]).

NOTE 1—Waite's Pr., Vol. 3, pp. 328-9 (ed. of 1874.)
Tomlinson vs. Mayer, 44 N. Y., 601, 607.
Ashley vs. Marshall, 29 N. Y., 494, 501.
Mayers vs. Amidon, 45 N. Y., 169.
Van Slyke vs. Hyatt, 46 N. Y., 259, 263.
Lefler vs. Field, 47 N. Y., 407.

NOTE 2—Mead vs. Supervisors, 41 Wis., 205, 208.
Wrigglesworthy vs. Wrigglesworthy, 45 Wis., 255, 257.
Barry vs. Schmidt, 57 Wis., 172, 176.

In Barry vs. Schmidt (p. 176), Judge Orton says: "But the finding is silent as to any such issue of fact, and there was no request on the part of the defendant that the court should find on such issue, and there was no objection made or exception taken at the time, to the failure or ommission so to find, and therefore such deficiency of the findings was waived."

In Wrigglesworthy vs. Same, Judge Taylor said, (p. 257): "If the defendant desired that there should have been any particular finding of fact, he should have called the attention of the court to the matter of fact upon which he desired a separate
22 finding, and when the Court found upon the facts so pointed out, should have taken an exception if the finding was not satisfactory."

The same reasoning applies to conclusions of law. Plaintiffs in error asked only one conclusion of law to-wit, "that the plaintiff is not entitled to any relief herein." (Transcript, p. 42.)

In this case, counsel for each party made and filed a draft of the findings and conclusions, which he thought the judge should make and sign. In them he embodied the points on which he then, at the conclusion of the trial, rested his case. The draft of the findings and conclusions of the plaintiff in error, his final act before judgment, is part of the record.

23 Section 709 of United States Statutes, gives this court jurisdiction to review the judgment of a State Court of last resort. First, "Where is drawn in question the validity of a treaty * * Second, "where is drawn in question the validity of a statute of * * any State, on the ground of their being repugnant to the Constitution * * of the United States. * * Third, "when any title, right, privilege, or immunity is claimed under the Constitution * * of * * the United States." * * *

It appears to us that plaintiffs in error, seek by assignment of error to bring this case within the jurisdiction of this court upon the second and third clauses of Section 709. Under the
24 second, by errors third, eighth, ninth, and tenth; and under the third, by errors fourth, fifth, and seventh.

The jurisdiction of this court does nor attach under the second clause, which alone is recited in the writ of error, (Transcript, p. 105), because the record bears no sign that any federal question was "raised and presented" to the State court. The question must have been "raised and presented" in the trial court of the State in order to give this court jurisdiction under this second clause ([3]).

"Drawn in question," as used in this statute means, not "might have been raised," but "actually raised and presented and necessarily decided."

In Murdock vs. Hopkins this statute was fully considered and 25
interpreted. On page 635, 6, Justice Miller states this rule as the conclusion of the court. "We hold * * that it is essential to the jurisdiction of this court over the judgment of a State Court, that it shall appear that one of the questions mentioned in the act must have been raised, and presented to the State Court."

In Parmalee vs. Lawrence, Justice Nelson says (p. 38, 9); "The conflict of the state law with the Constitution of the United States * * must appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or upon the exceptions taken to the ruling of the court."

Neither does the jurisdiction attach under the third clause 26

NOTE 3—Murdock vs. Hopkins, 20 Wall 590, 635, 6.
Parmalee vs. Lawrence, 11 Wall 36, 38, 9.
Stevens vs. Franklin Co., 14 Wall 15, 19, 20, 1, 2.
Farney vs. Towle, 1 Black. 350.
Limmerman vs. Nebraska, 116 U. S. 54.
Messenger vs. Mason, 10 Wall 507.
Santa Cruz Co. vs. Santa Cruz R. R., 111 U. S., 361, 2.
Broom Co. vs. Broom Co., 110 U. S. 57, 8, 9,
Walker vs. Sauvient, 92 U. S. 90, 93. 27
Choetan vs. Gibson, 111 U. S. 200-1.

of section 709, because no "title, right, or privilege or immunity," is "specially set up or claimed" (4).

So far we have reviewed the record in that court—Complaint, Answer, Exceptions and Request for Findings—and we find no evidence of the raising or presentation of any federal question.

It cannot be said that it is not the province of a pleading to raise constitutional questions. The complaint sets forth the only legislation of the State which is involved. (Transcript, p. 2.) The answer invokes the Constitution of Wisconsin, but not of the United States. (Transcript, pp. 15, 16 and 22.)

28

The Supreme Court of Wisconsin acted in this case simply as a court of review. Therefore the plaintiffs in error could not give this court jurisdiction by raising or presenting a federal question in that court (5).

The only record that court has made in this case is its opinion. It could not by its opinion give the court jurisdiction. This court will not look into the opinion to find support for its juris-

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NOTE 4—Spies vs. Ills., 123 U. S., 131, 181.
Baldwin vs. Kansas, 129 U. S., 52, 56-7.
Chappell vs. Bradshaw, 128 U. S., 132-3-4.
R'y Co. vs. Guthard, 114 U. S., 133-137.

29

Santa Cruz Co. vs. Santa Cruz R. R. Co., 111 U. S., 361.
Brown vs. Colorado, 106 U. S., 95-97.
Clark vs. Pa., 128 U. S., 395-7.

NOTE 5—Spies vs. Ills., 123 U. S., 131, 181, 182.
Baldwin vs. Kansas, 129 U. S., 52, 57.
Brooks vs. Mo., 124 U. S., 394-5.
Stevens vs. Franklin Co., 14 Wall., 15, 19, 22.
Parmalee vs. Lawrence, 11 Wall., 36-8-9.
Ins. Co. vs. Treasurer, 11 Wall., 208.

30

diction (6). But if the court does look into the opinion, it will not find any federal question presented by it. The citation does not hint at any federal question.

And further, if the counsel for plaintiffs in error will submit to this court all the five briefs filed on its behalf in the Supreme Court of Wisconsin, there will not be found in any one of them a hint that they rely upon any provision of the Constitution of the United States.

It does not seem to have occurred to the counsel for plaintiffs in error that any federal question could be raised in the case, until 31
they read the opinion of Judge Lyon herein. Evidently, they then looked around for the federal question.

No Federal Question Involved.

Does the record show that the judgment sustains any statute of, or authority exercised under, the state, as against any provision of the Constitution of the United States, that might have been invoked in behalf of plaintiff in error?

True, the court did hold that the water power in question was one of those referred to in Section 16, of act approved August 8, 1848, Laws of Wisconsin. It also held that the owner of the south shore having permitted the State to enter on his land 32
and build the dam in question, in 1855, under the statute of Wisconsin of 1848; and having permitted the State and its grantees to keep the dam on this land, and repair and maintain the same for over twenty years; and having permitted the United States to rebuild the same a little lower down stream in 1876; all without objection; and the United States having made ample provis-

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Note 6—Parmalee vs. Lawrence, 11 Wall., 36-7-8-9.
Ins. Co. vs. Treasurer, 11 Wall., 208.
R. R. vs. R. R., 21 Wall., 23, 24, 25.
Moore vs. Mississippi, 14 Wall., 636, 639.
Ohio vs. Oregon, 116 U. S., 549, 550. 33

ion by law for the assessment of all damages for taking property for this improvement,—the riparian owners could not now, in 1880, assert title to the hydraulic power furnished by the dam.

The court did not determine upon the validity of the State law; or upon any right asserted under it. It determined that the riparian owner, having acquiesed in the action of the State and its grantees under same, for twenty-five years, and having permitted the State and its grantees, and the United States, to act under the statute, and build and maintain dams under it, could not now retake, in its vastly improved condition, the property
34 taken under authority of statute:—that it could not take its property, and the trust property of the State, intermixed with it, by the tacit consent of the riparian owner, especially, while there was a valid legal provision for assessment and payment of damages.

True, Judge Lyon, in expressing the opinion of the court, said:

"The writer ventures to express the opinion that there are federal questions involved in it, which will support an appeal to the Supreme Court of the United States, and the desire that such appeal may be taken, to the end that the relative rights of the plaintiff and other claimants to the water power created by the improvement of the Fox River, now owned by the United
35 States, may be finally determined by that tridunal."

This language indicates that in the opinion of Judge Lyon, "there are federal questions involved," but not that any federal questions were "drawn in question" as provided by the statute, or "raised and presented," as held necessary in Murdock vs. Memphis. If any such questions had been "drawn in question," or "raised and presented," Judge Lyon would no doubt have recited them, as he wished ho have the decision reviewed by this court.

In fact, Judge Lyon's opinion on the motion for rehearing indicates that the construction of the deed, Green Bay and Mississippi Canal Co. to the United States, was the federal question he had in mind. That federal question is entirely eliminated from the case by the modification of the opinion on motion for rehearing.

No advantage can be taken of any expressions in any of proceedings of plaintiffs in error, if any such are to be found, as speak generally of constitutionality. In such cases, if any there are, reference is made to the State Constitution. That was brought in question on the oral argument, as well as invoked by the 37
answer.

The fifth amendment to the United States Constitution, restricts the power of the United States, and not that of the States. (7)

III.

FOURTEENTH AMENDMENT.

No reference can be made to the fourteenth amendment to Constitution of United States. The State legislation construed by the Supreme Court of Wisconsin, was enacted in 1848. The fourteenth amendment was adopted in 1868.

If it is contended that the property was taken by the decision, then plainly it was taken by "due process of law" (8). If it is 38

NOTE 7—Barron vs. Baltimore, 7 Pet., 243, 247.
Holmes vs. Jennison, 14 Pet., 540, 587.
Withers vs. Buckley, 20 How. 84, 88, 89.
Twitchell vs. Com'lth, 7 Wall., 321, 5, 6.
Davidson vs. New Orleans, 96 U. S., 97, 101.
Munn vs. Illinois, 94 U. S., 113, 124.
Slaughter House Cases 16 Wall., 36, 77, 80.

NOTE 8—Kennard vs. Morgan, 92 U. S., 480.
Hagar vs, Reclamation Dist., 111 U. S., 701
Davidson vs. New Orleans; 96 U. S., 97. 39
Walker vs. Sauvinet, 92 U. S., 90-93.

contended that it was taken by the act of 1848, then it was taken by legislation over which this court has no supervision.

Federal constitutional limitations on State power have no retroactive effect (9). No law has a retroactive effect unless the intention that it shall have is clearly expressed (10). This rule applies to construction of constitutional law as well as statutory law (11).

NOTE 9—Owings vs Speed, 5 Wheat., 420.
Approved in Scott vs. Jones, 5 How., 343, 377; also by
40 Sedgwick, State and Const. law, P. 618.
Cooper vs. Telfair, 4 Dall 14, 19.
Sedgwick, State, and Const. Law, 160, 161.

NOTE 10—Amsbury vs Hinds, 48 N. Y., 57, 60.
Price vs. Mott, 52 Pa. St., 315, 316.
Abington vs. Doxbury, 105 Mass., 287, 292.
State vs. Roosa, 11 Ohio St., 16.
Torry vs. Corless, 33 Me., 333, 336.
Nillair vs. Balto., 45 Md., 546, 555.
Finney vs. Ackerman, 21 Wis., 268, 270.
City vs. Hill, 39 N. J. L., 555, 558.
Collins vs. Ry., 9 Heisk., 841, 847.
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NOTE 11—Indiana Co. vs. Agricul. Soc., 85 Pa. St., 357, 360.
Lehigh Iron Co., 81 Pa. St., 481-5.
Douglas vs. Harrisville, 9 W. Va., 162, 165-6.
Brown vs. The State, 23 Md., 503, 511.
State vs. Macon Co., 41 Mo., 453, 463.
Slack vs. Railroad, 13 B., Mon., 1, 17.
Cass vs. Dillon, 2 Ohio St., 607, 611, 612.
State vs. Trustees, 8 Ohio, 394, 398, 9.

Whether or not the act of the State is consistent with the State Constitution, is the only constitutional question pressed in State court by plaintiff in error. That question is not within jurisdiction of this court. ([12])

MOSES HOOPER,

For Defendant in Error.

NOTE 12—Jackson vs. Lamphire, 2 Pet., 280. 43
Withers vs. Buckley, 20 How., 84.
Medbury vs. Ohio, 24 How., 413.
Porter vs. Foley, 24 How., 415.
Salmons vs. Graham, 15 Wall., 208.
Davidson vs. New Orleans, 96 U. S., 97.
Barbier vs. Conolly, 113 U. S., 27, 30.
Baldwin vs. Kansas, 129 U. S., 52, 57.
Walker vs. Sauvinet, 92 U. S., 90, 93.